TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
PETITIONERS,

vs.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 17, 1952

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. _____

LOUIS LEVINSON AND MITCHELL A. HALL,

Appellants,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,

Appellee.

TRANSCRIPT OF RECORD

INDEX

PROCEEDINGS IN UNITED STATES COURT OF APPEALS — SIXTH CIRCUIT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

In Admiralty No. 364

WILLIAM DEUPREE, JR., 106 East Third Street, Covington, Kentucky, Ancillary Administrator of the Estate of Katherine Wing, deceased,

Libelant,

v.

LOUIS LEVINSON, 119 Riverside Parkway, Fort Thomas, Kentucky,

and

MITCHELL A. HALL, 75 Rossford Avenue, Fort Thomas, Kentucky,

Respondents.

LIBEL

(Filed: 12/7/1948)

The libel and complaint of William Deupree, Jr., as ancillary administrator of the Estate of Katherine Wing, deceased, in a cause of wrongful death, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

1. Katherine Wing, also known as Kitty Wing, died intestate a resident of New York County, State of New York on the 19th day of June, 1948. On or about the 22nd day of October, 1948, Rose Wing qualified as administratrix of the estate of said decedent in the Surrogate's Court of New York County, New York, by taking the oath and executing bond as required by law, and said Rose Wing ever since that date has been and now is

the regular qualified and duly acting administratrix of the estate of Katherine Wing, deceased. On or about the 7th day of December, 1948, libelant and petitioner, William Deupree, Jr. qualified as ancillary administrator of the estate of said Katherine Wing, deceased, in the County Court of Kenton County, Kentucky, by taking the oath and executing bond as required by law, and libelant and petitioner ever since that date has been and now is the regular qualified and acting ancillary administrator of the estate of Katherine Wing, deceased.

2. On June 19, 1948, intestate Katherine Wing was a passenger in a motorboat owned by respondent, Louis Levinson, which was being operated and piloted downstream by said Levinson in a northwesterly direction on the Ohio River in Campbell County, Kentucky, and within the jurisdiction of the State of Kentucky, near the Cincinnati Yacht Club which is located on the northeast shore of said river in Hamilton County, Ohio. At the same time and place respondent Mitchell A. Hall was the owner of a motorboat which he was operating and piloting upstream in a southeasterly direction.

3. Said respondents, and each of them, at said time and place, operated and piloted their motorboats negligently, wilfully and maliciously at a high and excessive rate of speed without regard to the safety of themselves or each other or of others, without yielding the right of way, without giving proper signals and without stopping their engines and backing their boats as they should, lawfully and in the exercise of ordinary discretion and reasonable care, have done. By reason of said negligent, wilful and malicious conduct upon the part of the respondents, and each of them, said respondents caused their respective motorboats to collide with one another, and as a direct and proximate result thereof libelant's and

petitioner's intestate, without any negligence on her part, was thrown violently from her seat in respondent Levinson's boat against the side of said boat and into the water, receiving injuries which caused her death.

4. By reason of the negligent, wilful and malicious conduct upon the part of the respondents' and each of them, as aforesaid, in causing and bringing about libelant's and petitioner's intestate's death, her estate has been damaged in the sum of one hundred and fifty thousand ($150,000.00) dollars.

WHEREFORE, William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased, prays for judgment against the respondents, and each of them, in the sum of one hundred and fifty thousand ($150,000.00) dollars, for his costs herein expended, and for such other and proper relief to which he may be entitled.

NICHOLS, WOOD, MARX & GINTER
900 Traction Building
Cincinnati, Ohio

GARY & GARY
New York, N. Y.

DEUPREE & DEUPREE
106 East Third Street
Covington, Kentucky
Proctors for Libelant and Petitioner

STATE OF KENTUCKY
COUNTY OF KENTON } ss

William Deupree, Jr., being first duly sworn; says that he is the libelant and petitioner in this action and that the facts set forth in the foregoing libel and petition are true to his information and belief.

/s/ WILLIAM DEUPREE, JR.

Sworn to before me and subscribed in my presence this day of December, 1948.

Notary Public, Kenton County, Kentucky

SEPARATE ANSWER OF RESPONDENT, LOUIS LEVINSON

(Filed 3/3/49)

To the Honorable Judges of the United States District Court for the Eastern District of Kentucky sitting in Admiralty at Covington is hereby tendered for filing the separate answer of the respondent, Louis Levinson, to the libel and complaint of William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased.

(1) Respondent, Louis Levinson, for answer herein to the libel and complaint of William J. Deupree, Jr., as the ancillary administrator of the estate of Katherine Wing, deceased, says that he is without knowledge or information sufficient to form a belief as to the truth of the averments in article (1) of said libel and complaint and therefore denies the allegations thereof.

(2) Admits that on June 19, 1948, one Katherine Wing was a passenger in a motor boat owned by this respondent and except for such admission of the allegations contained in article (2) of said libel and complaint denies the several allegations thereof.

(3) Denies the allegations of article (3) of said libel and complaint.

(4) Denies the allegations of article (4) of said libel and complaint.

WHEREFORE, the respondent prays that the libel be dismissed with costs.

/s/ CHAS. E. LESTER, JR.
for Lester & Riedinger
Lester & Riedinger
Proctors for Respondent,
Louis Levinson
8 East Fifth Street
Newport, Kentucky

Chas. E. Lester, Jr., says that he is a member of the law firm of Lester and Riedinger, proctors for respondent, Louis Levinson, and that said respondent is now absent from the Eastern District of Kentucky and from the Commonwealth of Kentucky and that the allegations contained in the foregoing separate answer of said respondent are true, as this affiant verily believes.

/s/ CHAS. E. LESTER, JR.
Chas. E. Lester, Jr.

Subscribed and sworn to before me by Chas. E. Lester, Jr., this the 17th day of March, 1949.

MELVA HEDGES,
Notary Public,
Campbell County, Kentucky.

My Commission expires:
September 3, 1952.

To Nichols, Wood, Marx and Ginter and
To Deupree and Deupree,
Proctors for Libelant:

Please take notice that an answer of which the within is a copy was this day duly filed in the above entitled cause in the office of the clerk of the within named court.

Dated at Covington, Kentucky, this the 17th day of March, 1949.

/s/ CHAS. E. LESTER, JR.
for Lester & Riedinger
Lester and Riedinger
Proctors for Respondent,
Louis Levinson
8 East Fifth Street
Newport, Kentucky

SEPARATE ANSWER OF RESPONDENT, MITCHELL HALL

(Filed: 3/3/1949)

To the Honorable Judges of the United States District Court for the Eastern District of Kentucky sitting in Admiralty at Covington is hereby tendered for filing the separate answer of the respondent, Mitchell Hall, to the libel and complaint of William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased.

(1) Respondent, Mitchell Hall, for answer herein to the libel and complaint of William J. Deupree, Jr., as the ancillary administrator of the estate of Katherine Wing, deceased, says that he is without knowledge or information sufficient to form a belief as to the truth of the averments in article (1) of said libel and complaint and therefore denies the allegations thereof.

(2) Admits that on June 19, 1948, one Katherine Wing was a passenger in a motor boat owned by respondent Louis Levinson; admits that this respondent was the owner of a motor boat which he was operating and piloting at the time and place mentioned in the libel and complaint and except for such admission of the allega-

tions contained in article (2) of said libel and complaint denies the several allegations thereof.

(3) Denies the allegations of article (3) of said libel and complaint.

(4) Denies the allegations of article (4) of said libel and complaint.

WHEREFORE, the respondent prays that the libel be dismissed with costs.

Blakely, Moore and Harrison,
Proctors for Respondent,
Mitchell Hall
106 East Third Street
Covington, Kentucky

Mitchell Hall says that he is one of the respondents herein and that the allegations contained in the foregoing separate answer are true.

Mitchell Hall

Subscribed and sworn to before me by Mitchell Hall this 22nd day of March, 1949.

Notary Public,
Kenton County, Kentucky.

My Commission expires:

To Nichols, Wood, Marx & Ginter and
To Deupree and Deupree,
Proctors for Libelant:

Please take notice that an answer of which the within is a copy was this day duly filed in the above entitled cause in the office of the clerk of the within named court.

Affidavit of Libelant

Dated at Covington, Kentucky, this the 22nd day of March, 1949.

/s/, BLAKELY, MOORE AND HARRISON,
Blakely, Moore and Harrison,
Proctors for Respondent,
Mitchell Hall
106 East Third Street
Covington, Kentucky

AFFIDAVIT OF LIBELANT FOR LEAVE TO SUE IN FORMA PAUPERIS

(Filed: 7/7/1949)

UNITED STATES OF AMERICA, EASTERN DISTRICT OF KENTUCKY, KENTON COUNTY, SS:

William Deupree, Jr., being first duly sworn, deposes and says that he is a citizen of the United States and the duly appointed and acting ancillary administrator of the estate of Katherine Wing, deceased, and as such is the libelant in the above captioned suit which was filed on December 7, 1948, and in which both respondents have entered their appearances by filing answers; that said respondents have moved the court for an order requiring libelant to give a stipulation with sufficient surety to pay all costs and expenses which may be awarded against libelant; that libelant is entitled to commence and maintain said suit and believes that he is entitled to the redress sought to be obtained therein; that the nature of the cause of action is for wrongful death of the plaintiff's decedent, Katherine Wing, which occurred as a result of a collision of a motor boat owned and operated by respondent Levinson, in which boat libelant's decedent was a passenger, and a motor boat owned and

operated by respondent Hall on the Ohio River in Campbell County, Kentucky, near Cincinnati, Ohio, on June 11, 1948, within the admiralty jurisdiction of this court; that libelant's decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given; that libelant is informed and believes that no person entitled by law to share in the estate of decedent Katherine Wing is able to pay the costs of said suit or to give security for the same; that this affidavit is made for the purpose of availing libelant of the rights and privileges in such cases provided in Section 1915, Title 28, of the United States Code.

WHEREFORE, deponent prays that he may have leave to prosecute said suit in *forma pauperis* pursuant to said statute and that respondents' motions for security for costs be denied.

/s/ William Deupree, Jr.

Sworn to before me and subscribed in my presence this 7th day of July, 1949.

Notary Public, Kenton County, Ky.

SPECIAL DEMURRER

(Filed 7/7/1949)

The respondent, Louis Levinson, demurs specially to the libel of William Levinson, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon the ground that it is apparent upon the face of the record herein (1) that this Court has no jurisdiction to try the within cause and (2) that this Court has no jurisdiction

over the subject matter and (3) that the libelant has not legal capacity to sue.

/s/ LESTER & RIEDINGER
Proctors for Respondent,
Louis Levinson

Served a copy of the within pleading by delivering a copy hereof to William J. Deupree, one of the proctors for libelant.

AUTHORITY

Walter's Adm'r. v. *Kentucky Traction and Terminal Company,* 206 Ky. 100, 266 S.W. 887, decided September 9, 1924

Hall's Adm'r. v. *L. & N.,* 102 Ky. 480, 43 S.W. 698, 19 Ky. L. Rep. 1529, 80 Am. St. Rep. 358, decided September Term 1897

Turner's Adm'r. v. *L. & N. R.R.,* 110 Ky. 879, 62 S.W. 1025, 23 Ky. L. Rep. 340, decided April Term 1901

Jones' Adm'r. v. *Lay,* 66 S.W. 720, 23 Ky. L. Rep. 2113, decided February 18, 1902

I.C.R.R. Co. v. *Stith, Adm'x.,* 120 Ky. 237, 85 S.W. 1173, 1 L.R.A. (NS) 1014, decided March 25, 1905

Jewel Tea Co., et al v. *Walker's Adm'r.,* 161 S.W. (2d) 66, 290 Ky. 328, decided February 24, 1942

Vassill's Adm'r. et al v. *Scarsella,* 166 S.W. (2d) 64, 292 Ky. 153, decided May 15, 1942

Examination of the Kentucky Digest, Southwestern Reporter, Kentucky Reports and Shepard's Citator reveals that there are no decisions on the point involved later than the two cases last cited.

SPECIAL DEMURRER

(Filed: 7/7/49)

The respondent, Mitchell Hall, demurs, specially to the libel of William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon the ground that it is apparent upon the face of the record herein (1) that this Court has no jurisdiction to try the within cause and (2) that this Court has no jurisdiction over the subject matter and (3) that the libelant has not legal capacity to sue.

/s/ BLAKELY, MOORE & HARRISON
Proctors for Respondent,
Mitchell Hall

Served a copy of the within pleading by delivering a copy hereof to William J. Deupree, one of the proctors for libelant.

AUTHORITY

Walter's Adm'r. v. *Kentucky Traction and Terminal Company,* 206 Ky. 100, 266 S.W. 887, decided September 9, 1924

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Jones' Adm'r. v. *Lay,* 66 S.W. 720, 23 Ky. L. Rep. 2113, decided February 18, 1902

Motion for Leave to Amend Libel

I.C.R.R. Co. v. *Stith, Adm'x.*,
120 Ky. 237, 85 S.W. 1173, 1 L.R.A.
(NS) 1014, decided March 25, 1905
Jewel Tea Co., et al v. *Walker's Adm'r.*,
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February 24, 1942
Vassill's Adm'r. et al v. *Scarsella*,
166 S.W. (2d) 64, 292 Ky. 153, decided
May 15, 1942

Examination of the Kentucky Digest, Southwestern Reporter, Kentucky Reports and Shepard's Citator reveals that there are no decisions on the point involved later than the two cases last cited.

MOTION FOR LEAVE TO AMEND LIBEL

(Filed: 7/29/1949)

Now comes the libelant and, pursuant to Admiralty Rule 23, moves the Court for leave to file herein his amended libel, which is attached hereto, making the libelant a party in his capacity as ancillary administrator of the Estate of Katherine Wing, deceased, appointed by the County Court of Campbell County, Kentucky.

Proctors for Libelant

AMENDED LIBEL

(Filed: 7/29/1949)

The amended libel and complaint of William Deupree, Jr., as ancillary administrator of the Estate of Katherine Wing, deceased, in a cause of wrongful death, civil and maritime, alleges and respectfully shows to this Honorable Court as follows:

1. Katherine Wing, also known as Kitty Wing, died intestate a resident of New York County, State of New York on the 19th day of June, 1948. On or about the 22nd day of October, 1948, Rose Wing qualified as admin-

istratrix of the estate of said decedent in the Surrogate's Court of New York County, New York, by taking the oath and executing bond as required by law, and said Rose Wing ever since that date has been and now is the regular qualified and duly acting administratrix of the estate of Katherine Wing, deceased. On or about the 7th day of December, 1948, libelant and petitioner, William Deupree, Jr., qualified as ancillary administrator of the estate of said Katherine Wing, deceased, in the County Court of Kenton County, Kentucky, by taking the oath and executing bond as required by law, and on or about the 28th day of July, 1949, he qualified as ancillary administrator of the estate of said Katherine Wing, deceased in the County Court of Campbell County, Kentucky, by taking the oath and executing bond as required by law, and libelant and petitioner ever since those dates has been and now is the regular qualified and acting ancillary administrator of the estate of Katherine Wing, deceased.

2. On June 19, 1948, intestate Katherine Wing was a passenger in a motorboat owned by respondent, Louis Levinson, which was being operated and piloted downstream by said Levinson in a northwesterly direction on the Ohio River in Campbell County, Kentucky, and within the jurisdiction of the State of Kentucky, near the Cincinnati Yacht Club which is located on the northeast shore of said river in Hamilton County, Ohio. At the same time and place respondent Mitchell A. Hall was the owner of a motorboat which he was operating and piloting upstream in a southeasterly direction.

3. Said respondents, and each of them, at said time and place, operated and piloted their motorboats negligently wilfully and maliciously at a high and excessive rate of speed without regard to the safety of themselves

or each other or of others, without yielding the right of way, without giving proper signals and without stopping their engines and backing their boats as they should, lawfully and in the exercise of ordinary discretion and reasonable care, have done. By reason of said negligent, wilful and malicious conduct upon the part of the respondents, and each of them, said respondents caused their respective motorboats to collide with one another, and as a direct and proximate result thereof libelant's and petitioner's intestate, without any negligence on her part, was thrown violently from her seat in respondent Levinson's boat against the side of said boat and into the water, receiving injuries which caused her death.

4. By reason of the negligent, wilful and malicious conduct upon the part of the respondents, and each of them, as aforesaid, in causing and bringing about libelant's and petitioner's intestate's death, her estate has been damaged in the sum of one hundred and fifty thousand ($150,000.00) dollars.

WHEREFORE, William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased, prays for judgment against the respondents, and each of them, in the sum of one hundred and fifty thousand ($150,000.00) dollars, for his costs herein expended, and for such other and proper relief to which he may be entitled.

NICHOLS, WOOD, MARX & GINTER
900 Traction Building
Cincinnati, Ohio

GARY & GARY
New York, N. Y.

DEUPREE & DEUPREE
106 East Third Street
Covington, Kentucky
Proctors for Libelant and Petitioner

Order

STATE OF KENTUCKY
COUNTY OF KENTON } SS

William Deupree, Jr., being first duly sworn, says that he is the libelant and petitioner in this action and that the facts set forth in the foregoing amended libel and complaint are true to his information and belief.

/s/ William Deupree, Jr.

Sworn to before me and subscribed in my presence this day of July, 1949.

Notary Public, Kenton County, Ky.

ORDER

(Filed: 8/2/1949)

This 29th day of July 1949, came the libelant, by counsel, Nichols, Wood, Marx and Ginter, and offers for filing motion for leave to amend libel and amended libel, and the Court being advised, it is ordered that the same be now filed and noted of record.

Mac Swinford, *Judge*

ORDER

(Filed: 9/2/1949)

This case is set down for a pre-trial conference at Covington, Kentucky, in the regular Federal Courtroom at eleven (11:00) o'clock A. M., Eastern Standard Time, on Friday, September 9, 1949.

Mac Swinford, *Judge*

ORDER

(Filed: 9/29/1949)

This cause came on pursuant to order entered herein on September 2, 1949, for a pre-trial conference.

The parties were represented by counsel of record.

General Demurrer

Arguments were heard and the court made the following ruling:

> The affidavit of the libelant setting forth the fact that the decedent had no property in this state at the time of her death should be considered by the Court in ruling on the special demurrer. To this ruling the libelant objects and excepts.
>
> The special demurrer is sustained to which the libelant objects and excepts.
>
> The amended libel heretofore marked tendered is ordered filed. To which the respondents except.

Came the respondents and demur generally to the amended libel.

The Libelant is given until September 15, 1949 to file a brief in opposition to the general demurrer.

The respondents are given until September 20, to file a brief in support of the general demurrer.

The clerk will forward the record to the court on September 20th, 1949.

MAC SWINFORD, *Judge*

GENERAL DEMURRER

(Filed: 9/9/1949)

The respondent, Louis Levinson, demurs generally to the amended libel of William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon the ground that said pleading does not state facts sufficient to constitute or support a cause of action.

Proctors for Respondent,
Louis Levinson

Served a copy of the within pleading by delivering a copy hereof to William J. Deupree, one of the proctors for libelant.

AUTHORITY

Walter's Adm'r. v. *Kentucky Traction and Terminal Company,* 206 Ky. 100, 266 S.W. 887, decided September 9, 1924

Hall's Adm'r. v. *L. & N.,* 102 Ky. 480, 43 S.W. 698, 19 Ky. L. Rep. 1529, 80 Am. St. Rep. 358, decided September Term 1897

Turner's Adm'r. v. *L. & N. R.R.,* 110 Ky. 879, 62 S.W. 1025, 23 Ky. L. Rep. 340, decided April Term 1901

Jones' Admr. v. *Lay,* 66 S.W. 720, 23 Ky. L. Rep. 2113, decided February 18, 1902

I.C.R.R. Co. v. *Stith, Adm'x.,* 120 Ky. 237, 85 S.W. 1173, 1 L.R.A. (NS) 1014, decided March 25, 1905

Jewel Tea Co., et al v. *Walker's Adm'r.,* 161 S.W. (2d) 66, 290 Ky. 328, decided February 24, 1942

Vassill's Adm'r. et al v. *Scarsella,* 166 S.W. (2d) 64, 292 Ky. 153, decided May 15, 1942

Examination of the Kentucky Digest, Southwestern Reporter, Kentucky Reports and Shepard's Citator reveals that there are no decisions on the point involved later than the two cases last cited.

GENERAL DEMURRER

(Filed: 9/9/1949)

The respondent, Mitchell Hall, demurs generally to the amended libel of William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon

the ground that said pleading does not state facts sufficient to constitute or support a cause of action.

/s/ BLAKELY, MOORE & HARRISON
Proctors for Respondent,
Mitchell Hall

Served a copy of the within pleading by delivering a copy hereof to William J. Deupree, one of the proctors for libelant.

AUTHORITY

Walter's Adm'r. v. *Kentucky Traction and Terminal Company,* 206 Ky. 100, 266 S.W. 887, decided September 9, 1924

Hall's Adm'r. v. *L. & N.,* 102 Ky. 480, 43 S.W. 698, 19 Ky. L. Rep. 1529, 80 Am. St. Rep. 358, decided September Term 1897

Turner's Adm'r. v. *L. & N. R.R.,* 110 Ky. 879, 62 S.W. 1025, 23 Ky. L. Rep. 340, decided April Term 1901

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Jewel Tea Co., et al v. *Walker's Adm'r.,* 161 S.W. (2d) 66, 290 Ky. 328, decided February 24, 1942

Vassill's Adm'r. et al v. Scarsella, 166 S.W. (2d) 64, 292 Ky. 153, decided May 15, 1942

Examination of the Kentucky Digest, Southwestern Reporter, Kentucky Reports and Shepard's Citator reveals that there are no decisions on the point involved later than the two cases last cited.

Memorandum

ORDER

(Filed: 9/26/1949)

The general demurrer to the libel as amended is sustained.

MAC SWINFORD, *Judge.*

MEMORANDUM

(Filed: 9/26/1949)

The general demurrer should be sustained. While this claim for wrongful death is prosecuted in admiralty the law of Kentucky must control and the state wrongful death statute is the authority for the libel. The provisions of a state statute giving or regulating rights of action for death shall not be affected by the enabling admiralty procedure statutes. 41 Stat. 538; 46 F. C. A. 767.

Under the Kentucky authorities the appointment of William Deupree, Jr., as ancillary administrator by the Kenton County Court was void. The amendment setting up his subsequent appointment by the Campbell County Court, shown on the face of the record to be more than a year after the alleged wrongful death cannot relate back to the inception of the libel proceeding and the claim is barred. *Vassill's Admr., etc.* v. *Scarsella*, 292 Ky. 153; *Jewell Tea Co., et al* v. *Walker's Admr.*, 290 Ky. 328.

An Order sustaining the general demurrer is this day entered.

MAC SWINFORD, *Judge.*

MOTION

(Filed 9/28-49)

Respondents, Louis Levinson and Mitchell Hall, mov for an order granting them judgment upon the pleading herein.

/s/ CHAS. E. LESTER, JR.
for Lester & Riedinger
Proctors for Respondent
Louis Levinson

/s/ W. BAXTER HARRISON
for Blakely, Moore & Harrison
Proctors for Respondent
Mitchell Hall

AUTHORITY

The Court's ruling upon the general demurrer.

Copy of the within motion mailed to each of the following:

/s/ CHAS. E. LESTER, JR.

Deupree & Deupree
Lawyers Building
Covington, Kentucky

Gary & Gary
63 Wall Street
New York, New Yor

Nichols, Wood, Marx & Ginter
900 Traction Building
Cincinnati 2, Ohio

JUDGMENT

(Filed: 10/5/1949)

This cause having been heretofore submitted on libelants general demurrer to the libel as amended and the Court having sustained said general demurrer and the libelant having declined to plead further it is now ordered and adjudged that the libel as amended be and the same is hereby dismissed at the cost of the libelant.

To all of which libelant objects and excepts.

MAC SWINFORD, *Judge.*

Mandate

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 11,104

WILLIAM DEUPREE, JR., ETC.

v:

LOUIS LEVINSON et al.

MANDATE

(Filed May 2, 1951)

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Kentucky—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Kentucky, before you or some of you, in a cause between William Deupree Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, Libelant, and Louis Levinson and Mitchell A. Hall, Respondents, (D. C. No. 364, In Admiralty), a judgment was entered on the 5th day of October 1949, dismissing the libel as amended,

AND WHEREAS, the said Libelants appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of

an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed and the cause is remanded for further proceedings in accordance with the opinion herein.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable FRED M. VINSON, Chief Justice of the United States, the thirtieth day of April in the year of our Lord one thousand nine hundred and fifty-one.

COSTS—to be recovered by appellant	
Clerk	$25.00
Printing record	$
Attorney	$
TOTAL	$25.00

J. W. MENZIES,
Clerk, United States Court of Appeals for the Sixth Circuit,

By CARL W. REUSS,
Chief Deputy Clerk.

Opinion

OPINION UNITED STATES COURT OF APPEALS FOR SIXTH DISTRICT

(Filed: 12/20/1950)

Decided December 22, 1950

Before HICKS, Chief Judge, ALLEN and MCALLISTER, Circuit Judges:

ALLEN, Circuit Judge. The principal question presented by this appeal is whether admiralty cases are controlled by the decisions of state courts. The appeal arises out of a judgment of the United States District Court for the Eastern District of Kentucky which dismissed a libel in admiralty. The libel prayed for damages for the alleged wrongful death of Katherine Wing, a resident of New York State, who died June 19, 1948, as the result of a boat collision on the Ohio River in Campbell County, Kentucky. Appellee Levinson's answer admitted that Miss Wing was a passenger in a motorboat owned and operated by him on the date named. The libel averred that a motorboat owned and operated by appellee Hall collided with the motorboat operated by appellee Levinson, as a result of negligent, willful and malicious conduct on the part of both appellees which caused injuries resulting in decedent's death.

The libel, filed December 7, 1948, set forth that a domiciliary administratrix had been appointed in New York State on October 22, 1948, and that appellant had been appointed ancillary administrator by the Kenton County, Kentucky, court on December 7, 1948. Answers in the nature of general denials were filed March, 23, 1949. Appellees then moved for an order requiring appellant to give security for all costs and expenses which might be awarded against them. On July 7, 1949, after the one-year period

of limitation had run. (§ 413.140, K.R.S.), appellant filed an affidavit for leave to sue in forma pauperis, which stated that "Libelant's decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given." Special demurrers were filed upon the ground that the court had no jurisdiction to try the action; that the court had no jurisdiction over the subject matter of the action; and that appellant had not legal capacity to sue. The special demurrers were sustained, but the court granted appellant leave to file an amended libel. On July 29, 1949, an amended libel was filed which alleged that on July 28, 1949, appellant was appointed ancillary administrator in Campbell County, and that the libel was filed by him in such capacity. Other than this new allegation, the cause of action stated in the amended reply was identical with that originally stated. General demurrers were filed to the amended libel on the ground that it did not "state facts sufficient to constitute or support a cause of action." The court sustained the demurrers and dismissed the amended libel for reasons stated in a memorandum, which reads as follows:

> "'The general demurrer should be sustained. While this claim for wrongful death is prosecuted in admiralty the law of Kentucky must control and the state wrongful death statute is the authority for the libel. The provisions of a state statute giving or regulating rights of action for death shall not be affected by the enabling admiralty procedure statutes. 41 Stat. 538; 46 F.C.A. 767.
>
> Under the Kentucky authorities the appointment of William Deupree, Jr., as ancillary administrator by the Kenton County Court was void. The amendment setting up his subsequent appointment by the Campbell County Court, shown on the face of the

record to be more than a year after the alleged wrongful death cannot relate back to the inception of the libel proceeding and the claim is barred. *Vassill's Admr., etc.* v. *Scarsella,* 292 Ky. 153; *Jewell Tea Co., et al* v. *Walker's Admr.,* 290 Ky. 328."

Appellant contends that the District Court erred in holding (1) that decedent had no property within the state for payment of or security for possible costs or expenses; and (2) that the Kentucky decisions cited are controlling and require dismissal of the action. Appellees urge that both the Kentucky decisions and the holdings of the Supreme Court in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, require affirmance.

As to the first point, the District Court, in ruling on the special demurrers, held that the appointment of an ancillary administrator by the Kenton County court was void because appellant's affidavit in forma pauperis stated that the decedent had no property within the state for payment of or security for possible costs or expenses.

Assuming, but not deciding, that the District Court upon demurrer could consider the affidavits filed with the application to proceed in forma pauperis, this record clearly shows that there is an asset of the estate sufficient to support a grant of letters of administration. It is not necessary that the assets relied upon as a basis for local administration should be tangible. A mere claim or right of action enforceable within the jurisdiction, such as the present death action, will support a grant of administration. This is the established law of Kentucky. *Chesapeake & Ohio Ry. Co.* v. *Ryan's Admr.,* 188 Ky. 428. In this case the intestate received the injury resulting in his death in Carter County, Kentucky, but died in West Virginia. The Court of Appeals held that the

Carter County court had jurisdiction to appoint the plaintiff as administrator, notwithstanding the intestate was a non-resident of Kentucky, his death occurred in another state, and he left no property or indebtedness due him in Kentucky other than his right of action. Cf. *Austin's Admr.* v. *P., C. & St. L. Ry. Co.*, 122 Ky. 304, which held that where a non-resident has been killed in Kentucky by the tort of another, administration upon the estate of the non-resident decedent will be granted in Kentucky, because the statute which gives the right of action to the estate of the decedent for his death "ex necessitate rei" confers jurisdiction by implication to appoint an administrator to prosecute the suit.

In *Brown's Admr.* v. *L. & N. Rd. Co.*, 97 Ky. 228, 232, the court declared that the county where the decedent was injured and died was the proper county to grant administration; later *Chesapeake & Ohio Ry. Co.* v. *Ryan's Admr., supra*, at page 430, held that the existence of the injury alone is sufficient. The appointment in Campbell County, then, is supported by the existence of an asset, namely, a cause of action alleged to have arisen in Campbell County.

But since the first ancillary administrator was appointed not in Campbell County, but in Kenton County, the District Court held that the appointment to be void under Kentucky law and not cured by the appointment in Campbell County after the statute of limitations had run. As to this feature of the decision, appellant contends that the District Court erred in its construction of the Kentucky law and in holding that *Vassill's Admr.* v. *Scarsella*, 292 Ky. 153, and *Jewel Tea Co.* v. *Walker's Admr.*, 290 Ky. 328, are decisive. He urges that the Kentucky courts have held that defective appointments of this kind are not

void, but voidable. We think, however, that if the decisions of the Kentucky courts are to be applied in this admiralty case, the judgment of the District Court must be affirmed. The critical question, therefore, is whether the decisions of the state court are controlling, or whether the federal and admiralty law should be applied.

Upon this question we start with the basic proposition that this case is not grounded upon diversity of citizenship. As to diversity cases, "a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State * * *." *Guaranty Trust Co.* v. *York, supra,* at 108. This was a case which applied the rule of *Erie Rd. Co.* v. *Tompkins,* 304 U. S. 64 in an equity case involving the applicability of a state statute of limitations. If this holding governs in admiralty cases, the District Court was clearly correct in dismissing the action herein. But, as recently pointed out by the Supreme Court, the decision in *Erie Rd. Co.* v. *Tompkins* relates "only to the law to be applied in exercise of that [diversity] jurisdiction." *United States* v. *Standard Oil Co.,* 332 U. S. 301. Compare the statement made by Mr. Justice Jackson in his concurring opinion in *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447, 467, that "The Court has not extended the doctrine of *Erie Rd. Co.* v. *Tompkins* beyond diversity cases."

41 Stat. 538, 46 F. C. A. 767, cited in the District Court's memorandum ((46 U. S. C. §767), sheds no light upon the problem. It relates to actions for death on the high seas, and does not cover actions arising, as this, upon navigable rivers. Viewing the question as an open one, therefore, not ruled upon by the Supreme Court, we look to the practice in the federal and admiralty courts for guidance.

Opinion

It is a long-established rule in the federal courts that administrators are permitted to secure and perfect ancillary administration in states where the decedents were non-residents, even after the running of the statute of limitations. A lack of letters of administration may be cured or an objection of want of capacity to sue may be avoided by substitution of the proper party at any time before hearing, and later appointments of this nature relate back and validate the proceedings from the beginning. The leading case to this effect is *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570. There plaintiff, as sole beneficiary, brought an action provided for under state law. After the statute of limitations had run, the petition was amended to set up a federal cause of action and was filed by plaintiff both individually and as administratrix. The Supreme Court pointed out that, aside from the capacity in which plaintiff brought the action, there was no substantial difference between the original and the amended petitions, and held that the action was not barred. Here, too, the amendment in no way changes the issues, and in no way prejudices the appellees. Also in the instant case there is no change in the party bringing the action, but simply an amendment as to his capacity. The liberality of amendment in the federal courts goes even farther than this, allowing an actual change in the party plaintiff. *Leman* v. *Baltimore & Ohio Rd. Co.*, 128 Fed. 191; *Quaker City Cab Co.* v. *Fixter*, 4 Fed. (2d) 327 (C. A. 3); *Quin* v. *Kansas City Southern Ry. Co.*, 8 Fed. Supp. 78; *Jacobs* v. *Pennsylvania Rd. Co.*, 31 Fed Supp. 595; *Van Doren* v. *Pennsylvania Rd. Co.*, 93 Fed. 260 (C. A. 3).

To the same effect, cases involving the statute of limitations are *Hodges* v. *Kimball*, 91 Fed. 845 (C. A. 4); *Dodge*

v. *Town of North Hudson*, 188 Fed. 489; *Erie Rd. Co.* v. *Fritsch*, 72 Fed. (2d) 766 (C. A. 3); *McDonald* v. *State of Nebraska*, 101 Fed. 171 (C. A. 8); *Salyer* v. *Consolidation Coal Co.*, 246 Fed. 794 (C. A. 6); cf. *Keystone Coal & Coke Co.* v. *Fekete*, 232 Fed. 72 (C. A. 6), cert. denied, 242 U. S. 635; *United States* v. *Powell*, 93 Fed. (2d) 788 (C. A. 4); *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62.

These decisions are based upon the general proposition that in such cases the defect is purely formal or procedural, and that essential justice requires that liberal amendment be permitted. Numerous other decisions could be cited to the same effect, but it is sufficient to refer to 74 A. L. R. 1270, which states:

> "While the cases are not in entire harmony, it is usually held that an amendment changing capacity in which a plaintiff sues does not change the cause of action so as to let in the defense of limitations."

See also 5 Cyc. of Federal Procedure, §§ 1927-1929. It is pointed out repeatedly, as is in fact the case here, that there is no actual change in the cause of action and that the defendants are in no way prejudiced by allowing the amendment. As stated by Mr. Justice Holmes in *N. Y. Central & Hudson River Rd. Co.* v. *Kinney*, 260 U. S. 340, 346,

> "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied."

The irregularity relates, the courts hold, not to the cause of action but to the method of enforcing it. A statutory provision requiring action to be brought by an executor or administrator is not an essential part of the right created nor a jurisdictional prerequisite to the court's power to entertain the action. The important part of the law is that which gives a right of action, and not that part which provides who may enforce it; the latter is an incidental provision. *Lang* v. *Houston, W. S. & P. F. Rd. Co.*, 75 Hun 151. Here the person authorized to enforce the action was the person representing the deceased, § 413.140 (1), K. R. S., and under Kentucky law he is a merely nominal party. *Vaughn's Admr.* v. *L. & N. Rd. Co.*, 297 Ky. 309. Cf. *Stewart* v. *Baltimore & Ohio Rd. Co.*, 168 U. S. 445, 449. The substitution of one nominal party for another who has sued in the same capacity is permitted under federal law and relates back to the commencement of the action regardless of the statute of limitations. *Montgomery Ward & Co.* v. *Callahan*, 127 Fed. (2d) 32 (C. A. 10); *Lopez* v. *United States*, 82 Fed. (2d) 982, 987 (C. A. 4); *United States* v. *Powell*, *supra*.

It is significant that the limitation held by the District Court to bar the action is not embodied in the substantive law which creates the right of action. The Kentucky death statute, § 411.130, K. R. S., contains no limitation period. This was pointed out in *Irwin* v. *Smith*, 150 Ky. 147, 149, and *Finck* v. *Albers Super Market*, 136 Fed. (2) 191, 192 (C. A. 6). The one-year limitation which appellant concedes applies here is embodied in the general statute of limitations, § 413.140, K. R. S. Such a statute is procedural only. The Kentucky court in *Louisville & Nashville Rd. Co.* v. *Burkhart*, 154 Ky. 92, 98, rec-

ognized, with reference to an Indiana employer's liability statute containing no limitation period, that, since the statute that creates the right does not prescribe the period of limitation, the limitation as to time contained in a separate statute is not to be treated as a part of the right.

Even in diversity cases, while the substantive right created by statute is controlled by state law (*Erie Rd. Co.* v. *Tompkins, supra*) procedural matters are governed by the law of the forum. How the appellant should proceed and in whose name the action is brought is a matter of form only. *Montgomery Ward & Co.* v. *Callahan, supra.* The court in the *Callahan* case held that although suit had not been filed by the proper party within the period of the Kansas statute of limitations the claim was not barred.

In *Echevarria* v. *Texas Co.*, 31 Fed. Supp. 596, an administratrix was appointed in the wrong district of Puerto Rico. After the statute of limitations had run, plaintiff was appointed administratrix in the proper district by nunc pro tunc order. The order held the nunc pro tunc order ineffective, but indicated that substitution of a personal representative appointed in the proper district would be permitted although the statute of limitations had run.

The same principles are applied in admiralty cases (*The Horsa,* 232 Fed. 993). Admiralty procedure does not conform to the laws of the various states, but is uniform throughout the country; the practice or procedure is extremely liberal and the rules governing such practice are even less technical than those of equity. 2 C. J. S., Admiralty, § 70.

It has always been the practice in American admiralty courts to allow the parties every opportunity to place their whole case before the court and to enable the court

to administer substantial justice between the parties. It is therefore the long-established rule that omissions and deficiencies in pleadings may be supplied and errors and mistakes in practice in matters of substance as well as of form may be corrected at any stage of the proceedings for the furtherance of justice. 2 Benedict on Admiralty (6th Ed.), 557. "Where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel but to allow the party to assert his rights in the new allegation." Mr. Justice Story, in *The Adeline*, 9 Cranch, 224. *The Miss Nassau*, 55 Fed. (2d) 571 (C. A. 5). Amendments to libels are freely permitted under Rule 23, Rules of Practice in Admiralty and Maritime Cases. *The S. S. Nea Hellis*, 116 Fed. (2d) 803 (C. A. 2); *The Beaconsfield*, 158 U. S. 303; *Boston Ins. Co.* v. *City of New York*, 130 Fed. (2d) 156 (C. A. 2). Amendments are permitted in admiralty with much more liberality than at common law. *The Hamilton*, 146 Fed. 724 (C. A. 2).

In accordance with these principles it is held that an amendment of a libel dates back to the original filing. 2 Benedict on Admiralty, 562. This is true even though the statute of limitations has intervened. *The Pequot*, 4 Fed. (2d) 745; *The Resolute*, 17 Fed. (2d) 15 (C. A. 5); *Weldon* v. *United States*, 65 Fed. (2d) 748 (C. A. 1). In the *Weldon* case an order of the District Court denying a motion for substitution of libelant was reversed, although the statute of limitations had run. The court held that the decision of the Supreme Court in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf, supra*, was decisive of the case, pointing out that "Cases in which the defendant was not brought into court until after the period of limitation had expired stand on a very different footing. See *Davis, Agents,* v. *Cohen & Co., Inc.*, 268 U. S. 638. . . ."

A recent admiralty case to the same effect is *Bochantin* v. *Inland Waterways Corp.*, 9 F. R. D. 592. There a decedent had been drowned in the Mississippi River at St. Louis, Missouri. The Missouri wrongful death statute contains a one-year limitation provision, and in that particular the case was stronger against the plaintiff than the instant case, for the limitation might be considered to be part of the right. The death occurred February 27, 1948, and suit was instituted in admiralty by the administratrix February 26, 1949. The respondent objected to the libel on the ground that the statute provided that decedent's minor children and not the administratrix, should act as libelants. After the statute had run, the administratrix moved to amend by substituting herself as libelant in the capacity of next friend of the minor children. The court said: "All parties agree if state law is to control, the forum being Missouri, libelant must be denied the right (to amend,") citing *Goldschmidt* v. *Pevely Dairy Co.*, 341 Mo. 982. The court, pointing out that all that was sought by the libelant was to change her representative capacity from administratrix to next friend, and that no change whatever was made in the charge upon which recovery was sought, declared that the rule of *Erie Rd. Co.* v. *Tompkins* was inapplicable, and that under the admiralty rules, equity powers incidental to admiralty, and the federal decisions on substitution, the application should be granted to safeguard the administration of justice.

We conclude that the state law is not controlling. Since both federal law and admiralty law permit the procedural amendment sought to be made, we think the District Court erred in dismissing the action.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

Order Setting Aside Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

WILLIAM DEUPREE, JR., Ancillary Administrator of the Estate of Katherine Wing, Deceased,

Libelant,

v.

LOUIS LEVINSON and MITCHELL A. HALL,

Respondents.

ORDER SETTING ASIDE JUDGMENT AND RULING ON DEMURRERS AND OVERRULING GENERAL DEMURRERS TO AMENDED LIBEL

(Entered 5/15/51)

Pursuant to the Mandate and Opinion of the United States Court of Appeals for the Sixth Circuit which were ordered filed and noted of record in this court on May 2, 1951, the judgment dismissing the libel as amended heretofore entered herein on October 5, 1949, is hereby set aside and vacated, the order sustaining the general demurrer to the libel as amended heretofore entered herein on September 26, 1949, is hereby set aside and vacated, and the general demurrers of Respondent Levinson and of Respondent Hall to the amended libel, each filed herein on September 9, 1949, are overruled.

Respondents are granted until May 30, 1951, to plead to the amended libel.

MAC SWINFORD, *Judge.*

SEPARATE ANSWER OF RESPONDENT, LOUIS LEVINSON, TO LIBEL AS AMENDED

(Filed 5/29/51)

To the Honorable Judges of the United States District Court for the Eastern District of Kentucky sitting in Admiralty at Covington is hereby tendered for filing the separate answer of the respondent, Louis Levinson, to the libel and complaint as amended of William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased.

(1) Respondent, Louis Levinson, for answer herein to the libel and complaint as amended of William J. Deupree, Jr., as the ancillary administrator of the estate of Katherine Wing, deceased, says that he is without knowledge or information sufficient to form a belief as to the truth of the averments in article (1) of said libel and complaint as amended and therefore denies the allegations thereof.

(2) Admits that on June 19, 1948, one Katherine Wing was a passenger in a motor boat owned by this respondent and except for such admission of the allegations contained in article (2) of said libel and complaint as amended denies the several allegations thereof.

(3) Denies the allegations of article (3) of said libel and complaint as amended.

(4) Denies the allegations of article (4) of said libel and complaint as amended.

(5) Respondent, Louis Levinson, says that the alleged cause of action set forth in the libel and complaint as amended accrued to libelant, if at all, more than one year next before the filing of the libel and complaint and the amended libel and complaint, and said cause of action, if any there was, or is, is barred by the statute of limitations

in such cases made and provided, and this respondent relies upon said statute of limitations in bar of libelant's right to recovery for any of the matters set forth in the libel and complaint and the amended libel and complaint.

(6) Respondent, Louis Levinson, for further answer to the libel and complaint as amended, says that if libelant's intestate was injured, causing her death and damaging her estate, as alleged in the libel and complaint as amended, that said alleged injuries and resulting damages to said intestate's estate were caused and brought about by the negligence of said intestate contributing thereto and that but for said negligence on her part said injuries would not have been sustained by her or damages resulting to said estate, and respondent pleads and relies upon these facts as a bar to libelant's right to recover against him.

(7) Further answering, respondent, Louis Levinson, says that at the time of the collision of said motor boats and for several hours prior thereto said intestate was riding in the motor boat of this respondent and she and respondent were then and there and during said times engaged in a joint adventure or enterprise in the operation of said motor boat for their mutual pleasure and if said intestate sustained injuries in the course of said joint enterprise or adventure and which resulted in her death, then such injury and resulting death was among the risks ordinarily incident to said joint adventure or enterprise and for which this respondent is in no wise responsible; that the manner of respondent's operation of his said motor boat at the time and place alleged in the libel as amended and for several hours prior thereto, was well known to said intestate at the time libelant claims she received said injuries resulting in her death and that after having and acquiring such knowledge, said intestate continued to par-

ticipate in said joint adventure or enterprise and did so at her own risk, voluntarily and without any compulsion by this answering respondent.

(8) For further answer respondent, Louis Levinson, says that the collision between the two motor boats was caused and brought about by the sole negligence of his co-respondent, Mitchell A. Hall, and said collision of said boats and the resulting injuries and death of said intestate was unavoidable upon the part of this respondent.

(9) It appears of record in this court that libelant filed his libel and complaint in admiralty case No. 441 on the 5th day of January, 1950, against this respondent and his co-respondent, Mitchell A. Hall, and that said libel in said case No. 441 sets forth the identical cause of action alleged herein in case No. 364 and in said case No. 441 issue was joined by appropriate pleadings and said cause is ready for trial. Respondent makes the entire record in case No. 441 a part hereof by reference thereto and pleads and relies upon same in abatement of the cause of action being asserted in case No. 364.

(10) It is apparent upon the face of the record herein that this court has no jurisdiction to try the within cause, that this court has no jurisdiction over the subject matter and that libelant has not legal capacity to sue.

(11) The libel as amended herein does not state facts sufficient to constitute or support a cause of action.

WHEREFORE respondent, Louis Levinson, prays that the libel and complaint as amended be dismissed at the cost of libelant.

LESTER AND RIEDINGER,
Proctors for Respondent,
Louis Levinson
8 East Fifth Street
Newport, Kentucky

Answer of Respondent, Levinson

Chas. E. Lester, Jr., says that he is a member of the law firm of Lester and Riedinger, proctors for respondent, Louis Levinson, that said respondent is now absent from the Eastern District of Kentucky and from the Commonwealth of Kentucky and that the allegations contained in the foregoing separate answer of said respondent are true, as this affiant verily believes.

CHAS. E. LESTER, JR.

Subscribed and sworn to before me by Chas. E. Lester, Jr., this the 29th day of May, 1951.

Notary Public,
Campbell County, Kentucky

My commission expires:
September 3, 1952.

To:

NICHOLS, WOOD, MARX & GINTER
Attorneys at Law
900 Traction Building
Cincinnati, Ohio

GARY & GARY
Attorneys at Law
63 Wall Street
New York, New York

DEUPREE & DEUPREE
Attorneys at Law
105 East 3rd Street
Covington, Kentucky

BLAKELY, MOORE & BLAKELY
Attorneys at Law
105 East 3rd Street
Covington, Kentucky

Please take notice that an answer of which the within is a copy was this day duly filed in the within entitled cause in the office of the clerk of the within named court.

Dated at Covington, Kentucky, this the 29th day of May, 1951.

LESTER AND RIEDINGER,
Proctors for Respondent,
Louis Levinson
8 East Fifth Street
Newport, Kentucky

SEPARATE ANSWER TO LIBEL AS AMENDED OF RESPONDENT, MITCHELL A. HALL

(Filed 5/29/1951)

To the Honorable Judges of the United States District Court for the Eastern District of Kentucky sitting in Admiralty at Covington, is hereby tendered for filing the separate answer of the Respondent, Mitchell Hall, to the libel and complaint, as amended, of William Deupree, Jr., ancillary administrator of the estate of Katherine Wing, deceased.

(1) Respondent, Mitchell A. Hall, for answer herein to the libel and complaint as amended of William Deupree, Jr., as the ancillary administrator of the estate of Katherine Wing, deceased, says that he is without knowledge or information sufficient to form a belief as to the truth of the averments in Article (1) of said libel and complaint, as amended, and therefore denies the allegations thereof.

(2) Admits that on June 19th, 1948, one Katherine Wing was a passenger in a motor boat owned by Respondent, Louis Levinson; admits that this Respondent was the owner of a motor boat which was operated and piloted

at the time and place mentioned in the libel and complaint, as amended, and except for such admission of the allegations contained in Article (2) of said libel and complaint, as amended, denies the several allegations thereof.

(3) Denies the allegations of Article (3) of said libel and complaint, as amended.

(4) Denies the allegations of Article (4) of said libel and complaint, as amended.

(5) Respondent, Mitchell A. Hall, says that the alleged cause of action set forth in the libel and complaint, as amended, herein accrued to libelant more than one year next before the filing of the libel and complaint and the amended libel and complaint herein, and said cause of action, if any there was, or is, is barred by the Statute of Limitations in such cases made and provided, and this Respondent relies upon said Statute of Limitations in bar of libelant's right to recover for any of the matters set forth in the libel and complaint and the amended libel and complaint herein.

(6) Respondent, Mitchell A. Hall, for further answer to the libel and complaint, as amended, states that if libelant's intestate was injured, causing her death and damaging her estate as alleged in the libel and complaint, as amended, that said alleged injuries and resulting damages to libelant's intestate's estate were caused and brought about by the negligence of libelant and petitioner's intestate contributing thereto and but for said negligence on her part the collision would not have happened or any of the alleged injuries or damages resulted to libelant's intestate. The Respondent pleads and relies upon these facts as a bar to libelant's right to recover against him.

(7) The Respondent, Mitchell A. Hall, for further answer states that at the time of the collision between the

two motor boats, libelant's intestate was riding in a motor boat owned and operated by Respondent, Louis Levinson, and that the said Louis Levinson and Libelant's intestate were then and there engaged in a joint enterprise on a trip for the joint pleasure of libelant's intestate and the said Louis Levinson and that said motor boat was driven and operated by said Louis Levinson under the joint control of the driver and operator and libelant's intestate and that said collision was caused and brought about by the negligence of said Louis Levinson while acting as herein set out contributing thereto and but for said negligence the collision would not have occurred or any of the alleged injuries or damages resulting to plaintiff's intestate or her estate.

(8) Respondent, Mitchell A. Hall, for further answer states that the collision between the two motor boats were caused and brought about by the sole negligence of Louis Levinson, the driver and operator of the motor boat in which libelant's intestate was riding and was unavoidable on the part of this Respondent. He pleads and relies upon these facts as a bar to libelant's right to recover against him.

WHEREORE Respondent, Mitchell A. Hall, prays that the libel and complaint, as amended, be dismissed with costs.

MARION W. MOORE
For Blakely, Moore and Blakely
Proctors for Respondent,
Mitchell A. Hall
106 East Third Street
Covington, Kentucky

Motion to Strike from Answers

Mitchell A. Hall says that he is one of the Respondents herein and that the allegations contained in the foregoing separate answer are true.

MITCHELL A. HALL.

Subscribed and sworn to before me by Mitchell A. Hall this 29th day of May, 1951.

VIRGINIA BAGBY
Notary Public, Kenton County, Ky.

My commission expires: February 13, 1955.

MOTION TO STRIKE FROM ANSWERS TO AMENDED LIBEL

(Filed 6/29/1951)

Now comes the libelant and moves to strike from the answers to the amended libel the following:

1. From the separate Answer of Respondent Louis Levinson to the Libel as Amended the entire paragraph (5) of said answer, which avers that the cause of action is barred by limitations, for the reason that said defense has been heretofore raised herein by said respondent and has been decided contrary to his contention by the United States Court of Appeals for the Sixth Circuit, which decision is conclusive of this issue and binding upon this court and the parties hereto as res judicata and the law of the case.

2. From the said answer of respondent Levinson the entire paragraph (6) of said answer, which attempts to plead contributory negligence upon the part of libelant's decedent, for the reason that said paragraph sets forth a conclusion only and fails to allege any operative facts, and for the further reason that the claim of contributory

negligence is inconsistent with the allegation in paragraph (8) of said answer of sole negligence of respondent Hall.

3. From the said answer of respondent Levinson the entire paragraph (7) of said answer, which attempts to plead a joint enterprise or adventure engaged in by decedent and said respondent, for the reasons that no operative facts are pleaded in said paragraph to indicate a joint enterprise or adventure, that conclusions only are set forth, and that the claim of joint enterprise or adventure constitutes no defense and is inconsistent with the allegation of sole negligence of respondent Hall in paragraph (8) of said answer.

4. From the said answer of respondent Levinson the entire paragraph (8) of said answer, which attempts to plead sole negligence of respondent Hall, for the reason that said paragraph sets forth a conclusion only and fails to allege any operative facts, and for the further reasons that the admissions in said paragraph of the collision between the two motor boats and the resulting injuries and death of decedent are inconsistent with and contrary to the denial of said collision, injuries, and death contained in paragraph (3) of said answer, and that pleading sole negligence of another respondent is surplusage.

5. From the said answer of respondent Levinson the entire paragraph (9) of said answer, which attempts to plead in abatement of this case a pending case number 441 on the admiralty docket of this court, for the reason that said case number 441 was filed prior to the decision of the Court of Appeals herein, to protect libelant's rights, and has been, subsequent to said decision and the filing of said answer herein, dismissed and is not now pending.

6. From the said answer of respondent Levinson the entire paragraph (10) of said answer, which avers lack

of jurisdiction in this court to try this case, lack of jurisdiction in this court over the subject matter, and want of capacity in libelant to sue, for the reason that said defense has been heretofore raised herein by said respondent and has been decided contrary to his contention by the United States Court of Appeals for the Sixth Circuit, which decision is conclusive of this issue and binding upon this court and the parties hereto as res judicata and the law of the case.

7. From the said answer of respondent Levinson the entire paragraph (11) of said answer, which avers that the amended libel does not state facts sufficient to constitute or support a cause of action, for the reason that said defense has been heretofore raised herein by said respondent and has been decided adversely to his contention by the United States Court of Appeals for the Sixth Circuit, which decision is conclusive of this issue and binding upon this court and the parties hereto as res judicata and the law of the case.

8. From the Separate Answer to the Libel as Amended of Respondent Mitchell A. Hall the entire paragraph (5) of said answer, which avers that the cause of action is barred by limitations, for the reason that said defense has been heretofore raised herein by said respondent and has been decided contrary to his contention by the United States Court of Appeals for the Sixth Circuit, which decision is conclusive of this issue and binding upon this court and the parties hereto as res judicata and the law of the case.

9. From the said answer of respondent Hall the entire paragraph (6) of said answer, which attempts to plead contributory negligence upon the part of libelant's decedent, for the reason that said paragraph sets forth a

conclusion only and fails to allege any operative facts, and for the further reason that the claim of contributory negligence is inconsistent with the allegation in paragraph (8) of said answer of sole negligence of respondent Levinson.

10. From the said answer of respondent Hall the entire paragraph (7) of said answer, which attempts to plead a joint enterprise engaged in by decedent and respondent Levinson and contributory negligence upon the part of said Levinson, for the reasons that conclusions only are set forth in said paragraph that no operative facts are alleged, and that the claims of joint enterprise and contributory negligence of respondent Levinson are inconsistent with the allegations in paragraph (8) of said answer of sole negligence of respondent Levinson.

11. From the said answer of respondent Hall the entire paragraph (8) of said answer, which attempts to plead sole negligence of respondent Levinson, for the reasons that said paragraph sets forth a conclusion only and fails to allege any operative facts, that it is surplusage and that the admission in said paragraph of the collision between the two motor boats is inconsistent with and contrary to the denial of said collision contained in paragraph (3) of said answer.

12. Libelant also moves to strike the demand for a jury trial appended to the said answer of respondent Hall for the reason that there is no right to a trial by Jury in this admiralty suit.

NICHOLS, WOOD, MARX & GINTER
DEUPREE & DEUPREE
GAREY & GAREY
Proctors for Libelant

Order

ORDER

(Entered: 7/18/1951)

The Libelant's motion to strike paragraph (5) of the answer of the respondent Louis Levinson to the libel as amended, is sustained and that paragraph is Ordered stricken.

The Motion to strike the entire paragraph (6) of the answer of the respondent Levinson is overruled.

The Motion to strike paragraph (7) from the answer of the respondent Levinson is overruled.

The Motion to strike paragraph (8) from the answer of the respondent Levinson is sustained and the paragraph is Ordered stricken.

The Motion to strike the entire paragraph (9) from the answer of the respondent Levinson is sustained and the paragraph is Ordered stricken.

The Motion to strike paragraph (10) from the answer of the respondent Levinson is sustained and the paragraph is Ordered stricken.

The Motion to strike paragraph (11) of the answer of the respondent Levinson is sustained and the paragraph is Ordered stricken.

The Motion to strike paragraph (5) from the answer of the respondent Hall is sustained and the paragraph is Ordered stricken.

The Motion to strike the entire paragraph ((7) of the answer of Respondent Hall is overruled.

The Motion to strike paragraph (8) of the answer of Respondent Hall is sustained.

The Motion to strike the demand for jury trial appended to the answer is sustained.

MAC SWINFORD, *Judge*

LIBELANT'S DEMURRER TO PARAGRAPH (7) OF ANSWER OF RESPONDENT LEVINSON

(Filed: 7/30/1951)

Now comes the libelant and demurs to paragraph (7) of the Separate Answer of Respondent Louis Levinson to the Amended Libel on the ground that said answer fails to state a defense to the cause of action pleaded in said amended libel.

NICHOLS, WOOD, MARX & GINTER
DEUPREE & DEUPREE
GAREY & GAREY
Proctors for Libelant

ORDER

(Entered: 9/26/1951)

This case came on for hearing on Motions, came the respondent, Louis Levinson, and moved the Court for a continuance of this case. In support of the Motion he filed the Affidavit of his Proctor, Charles E. Lester, the Court being advised the Motion for a Continuance is overruled to which ruling of the Court the Respondent Louis Levinson excepts.

It is further Ordered that the Libelant's demurrer to Paragraph 7 of the answer of the respondent, Louis Levinson, is sustained, to which ruling of the Court the respondent Louis Levinson excepts.

The Court in overruling the Motion for Continuance advised counsel that upon a hearing of the case, should it be determined by the Court that the testimony of the witness Eugene Thomas was material to the issue or issues involved, that he would give counsel a reasonable

time to produce the testimony either orally or by way of deposition or interrogatories of the witness Thomas; a reasonable time to be considered not more than 90 days of date of trial.

By agreement of parties each party is given exceptions to rulings of the Court on all matters heretofore ruled upon and determined adversely to the party.

The case is set for trial by the Court at Covington, Ky., Federal Court Room on Wednesday, November 28, 1951, at 10:30 A. M.

MAC SWINFORD, *Judge*

REPLY

(Filed: 10/1/1951)

Now comes the libelant and, for reply to paragraphs (1), (2), (3), (4), and (6) of the Separate Answer of respondent Louis Levinson to libelant's Amended Libel and to paragraphs (1), (2), (3), (4), (6), and (7) of the Separate Answer of respondent Mitchell A. Hall, denies each and every allegation contained in said paragraphs except such allegations as are admissions of averments contained in said Amended Libel.

NICHOLS, WOOD, MARX & GINTER
DEUPREE & DEUPREE
GAREY & GAREY
Proctors for Libelant & Petitioner

STATE OF KENTUCKY }
COUNTY OF KENTON } ss:

William Deupree, Jr., being first duly sworn, says that he is the libelant and petitioner in this action and that

the facts set forth in the foregoing reply are true to his information and belief.

/s/ WILLIAM DEUPREE, JR.

Sworn to before me and subscribed in my presence this 1st day of October, 1951.

Notary Public, Kenton County, Ky.

ORDER

(Entered: 11/29/1951)

Pursuant to order heretofore entered, this cause came on for trial before the Court without the intervention of a jury.

Came the Libelant, in person and by Proctor, Nichols, Wood, Marx & Ginter; the respondent, Louis Levinson, not present in person but represented by Charles E. Lester, as Proctor; the respondent Mitchell A. Hall, in person and by Proctors, Blakely, Moore & Blakely.

The Court heard the opening statements of Proctors, and the evidence introduced.

IT IS ORDERED by the Court that the trial of this cause be continued until November 30, 1951—9 A. M.

MAC SWINFORD, *Judge*

ORDER

(Entered: 11/30/1951)

Pursuant to order this cause came on for further trial. Came the interested parties.

The Court heard the evidence introduced. Came the Libelant by Proctor, and offered for filing the Deposition of Mitchell A. Hall and the Court over the objections of

Proctors, Blakely, Moore & Blakely, ordered the deposition filed and noted of record.

The case proceeded with the introduction of witnesses for the Libelant.

At the close of the evidence for the Libelant, came the Respondents, Louis Levinson and Mitchell A. Hall and each of them and moved the Court for judgment dismissing the Libel. The Court being advised, overruled the motion.

Came then the respondents and each of them and offered evidence, which included the deposition of the Respondent, Louis Levinson. The Libelant objected to the offering of the deposition of Louis Levinson on the ground that it had heretofore been offered in evidence by the Libelant. The objection is overruled and the deposition is to be considered as part of the evidence in the case.

At the conclusion of the evidence for the Respondents came the Libelant and offered certain evidence in rebuttal.

At conclusion of all the evidence came Respondents and each of them and renewed their motion for a Judgment dismissing the Libel. The Court being advised, the motion is overruled.

Exceptions are given to the respective parties on all rulings contrary to their respective motions throughout the entire record.

It is stated by Charles Lester, Proctor for Respondent, Louis Levinson that he desires to offer testimony of one, Eugene G. Thomas, an eye witness to the collision of the two motor boats and asked the Court to allow him a reasonable time in order to produce the witness in accordance with the terms of an order of date Sept. 26, 1951. It is reported to the Court that the witness can be obtained within the next thirty days.

This case is assigned for final submission and oral argument for January 14, 1952—1:00 P.M., EST in the Federal Court Room, Covington, Kentucky.

MAC SWINFORD, *Judge*

TRANSCRIPT OF THE COURT'S OPINION

(Entered 1/15/1952)

THE COURT: Insofar as the question of law, which is argued by counsel for the respondents, is concerned, the Court concludes that the law of the case is stated in the opinion of the Court of Appeals and the mandate which came down from that court in reversing the decision of this court which held that the law of Kentucky giving the right of action was subject to the law of limitation on such actions in Kentucky. The Court of Appeals laid down the rule that this court was in error on that and consequently, as I see it, the only question to determine here is whether or not there was negligence as to either or both of these respondents and if that negligence, if any, was the proximate cause of the loss to the estate of the decedent, Kitty Wing; and the further question, in the event the court finds that there was such negligence, within the meaning of the law under the interpretation of the rules of admiralty and the law applicable to admiralty cases of this character, the amount that should be awarded in damages.

The court is of the opinion that it is a fair and reasonable inference from the evidence and there is direct proof of the fact that each of these respondents was negligent and that as they were joint tort-feasors they should stand the amount of damages which the court will award to this estate.

In the first place, the evidence is clear to me that these two motor boats were out there for a good time. It wasn't a commercial enterprise; it wasn't somebody on his business, but they were out there for the express purpose of pulling behind them these ski riders or these surf board riders. From the evidence, it appears that it was necessary that they make a certain speed in order to accomplish what they were out there to do. It is also shown conclusively from the evidence that the Levinson boat had two boys—13 or 14 years old—on behind on skis or surf boards and that they had been having some trouble in staying on the surf boards. It was all in fun and all a part of the party which they were having, but the driver of the boat, Louis Levinson, one of the respondents, was interested in watching his son and his son's companion on the back of the boat which he was driving or which he was piloting. There was evidence also that the Hall boat had this surf board rider or a ski rider on behind it and Mr. Hall, the respondent, who was piloting the boat was watching him to a certain extent.

I am unable to see how this accident could have possibly occurred if these pilots or either of them had been properly attending to the job of driving his boat. The Ohio River is more than a half mile wide at this point. They were fully aware of each other; they had been on the river there for some little time that afternoon. As I recall, one of the questions asked Mr. Levinson in the deposition which I have before me as part of the record on cross examination, he said that these boats had been playing around for about two hours. I am not trusting my memory sufficiently to state that as a fact and I am not finding that as a fact, but certainly it is not denied that these two operators of the boats were fully aware

of the other's presence and what each of them were doing. One of the witnesses who testified in the case said that the boats had come close to each other that afternoon; that they had come so close as to throw spray on her—a matter of a few feet from each other at a high rate of speed.

There is no evidence that there was any other boat on the river at that time in that locality. As far as this record is concerned it is barren of evidence that there was any other thing that might obstruct the view or might obstruct the maneuvering or the guiding of these boats at any time. They could have each done what they were doing without taking any chances of collision whatsoever. Instead of that they were, apparently, enjoying the sport of, according to the testimony of one of the witnesses, coming very close to each other and getting the thrill or the excitement or whatever it might be of giving the surf riders the waves from each other's boats. There is testimony that that is one of the things that a surf rider seeks.

The court must conclude that each of these boat operators and each of these respondents was negligent. Mr. Hall said that he was coming up the river; that he saw the other boat and if the other boat had kept its straight course that each of them could have passed without any possibility of a collision. The occupants of the other boat who testified said that the Levinson boat had gone upstream and made an arc or a circle and started back downstream, but had headed across the river. The diagrams that were drawn on the blackboard during the trial of the case and on the paper here show that this boat was headed toward the Ohio shore; from the time it made this arc it never actually straightened out of the arc. Certainly Mr. Hall should have taken cognisance of that fact. If he had

kept to his right or his starboard side, he should have known or been aware of the fact that with this boat heading almost diagonally across in front of his bow, that there was going to be a collision. He had ample time to avoid that collision, but he didn't do that. There is some testimony here that he had had a drink or two, but I can't assume that he was intoxicated; I am not holding that at all. There is certainly no basis of evidence for the court to reach that conclusion, but the court must conclude that he was looking behind him and didn't see the other boat. That is the only conclusion that could possibly be reached. It is not like two automobiles meeting on a highway where, at best, if everyone watches his business of driving, they are bound to come within a few feet of each other; on the average roads, except four lane highways where there is a parkway in between or a reasonable width in between, they must necessarily come within a few feet of each other. But here was a half mile or more of river which was available to both of the operators of these boats; instead of that they were trying to occupy the same place at the same time. They succeeded in doing that to the loss of the decedent's estate and the killing of Kitty Wing, who could not in anywise be called contributorily negligent or have anything to do with defending or protecting herself at the time.

On the other hand, from the evidence here, when Levinson made this arc or made this turn, he headed for the Ohio shore. He saw the other boat coming; he talked and discussed with his wife or she discussed with him the fact that Hall's boat was coming upstream. Notwithstanding that fact he proceeded in the same direction until he came in contact with him.

Aside from the violation of any of the navigation rules or regulations of the river, under the statutory requirements of the parties, the court must necessarily find that these two operators of these boats were not watching with ordinary care required of a person operating a boat. Neither of them were, because it could not thave happened had either of these gentlemen been alert to the situation which it was their duty to see.

There is not much use in going into this evidence in detail. Much of this evidence was depicted to the court by diagrams on the blackboard by the witnesses and by diagrams drawn, as I recall, on pieces of paper here during the trial. There wasn't very much conflict in the evidence. Each boat knew of the other's presence, but instead of avoiding the collision they rather seemed to ignore the facts and circumstances of the danger which resulted in the collision, by not trying sufficiently, under the law, to avoid it.

It will be the judgment of the court that they were each negligent and the damages awarded shall be awarded against both of them.

As far as the amount is concerned, it is always a problem for either a court or a jury where it is determined that there is wilful negligence. There is nothing in the facts of any kind of contribution on the part of the deceased to even mitigate the damages; that makes it even more difficult. Sometimes there are recoveries where there are some mitigating circumstances; although not in law sufficient to call contributory negligence, there are circumstances which justify a jury or a court in taking them into account in fixing the amount of damages.

This young girl was evidently very talented. She was a high school graduate; she had taken courses in dancing

in New York. She had been sufficiently successful in her profession to become an entertainer in well recognized places of entertainment. Whether or not she would have gone on to become what might be called a "headliner" or whether she would have remained more or less an obscure dancer is so highly speculative that the court would not undertake to say. She might have become as well known as some of the famous dancers of the screen, stage and television; on the other hand, she might never have gotten any farther than she already was. As a matter of fact, very few of them do go very far in their art or profession. But she was earning when she worked fifty to seventy dollars per week. She didn't work all the time; the nature of her work was such that she wasn't engaged all the time. Her mother and her brother testified about that. Another thing to consider is the character of her profession; while we can single out certain artists or dancers who have gone on for years, it must be recognized that time takes its toll of girls in the entertainment world. Age is one of the circumstances they have to consider when they take up that profession. As they get older they are less wanted and less desirable for certain kinds of entertainment such as dancing and personal appearances, as a rule.

This girl hadn't reached her full maturity as far as her art was concerned; she certainly had a good many years ahead of her. What that might have been is so highly speculative that the court, as I say, is always faced with a difficulty in assessing damages. It is possible that this girl could have gone on and earned $250,000; on the other hand, she might not have earned but a few hundred dollars or a few thousand dollars. During the time of that earning she was, of course, subject to have certain expen-

ditures; to take lessons and certain expenses to which she must necessarily be put to achieve perfection in her profession. I do not feel that it is necessary to go into any further discussion on this, because we would not be any further along if we discussed the law on that subject for another hour.

It seems to me that a fair and reasonable sum which her estate should be entitled to recover would be the sum of thirty thousand dollars. I think that is a fair sum; it is a reasonable and just verdict based on the evidence. That will include any funeral expenses which she had or any other expenses which may have been in the prayer of the complaint. That will be the judgment of the court.

I, Virginia Prather, Official Reporter, U. S. District Court, Eastern and Western Districts of Kentucky, do certify that the foregoing constitutes a true, full and accurate transcript of the Court's opinion in case No. 364, In Admiralty, *William Deupree, Jr., etc.* vs. *Louis Levinson and Mitchell Hall,* in the United States District Court at Covington, Kentucky, January 14, 1952, before His Honor, Mac Swinford, Judge of said Court.

In Testimony Whereof, Witness my official hand as reporter aforesaid, this the 15th day of January, 1952.

Virginia Prather,
Official Reporter

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE

(Filed and Entered: 2/1/1952)

This cause came on for further hearing on January 14 and February 1, 1952, pursuant to prior order of the court and, no party desiring to offer further evidence,

was submitted to the court after arguments of counsel for all parties. Whereupon, the court, after consideration of the pleadings and the evidence finds in favor of the libelant and against the respondents, jointly and severally, in the sum of $30,000.00, and the court hereby makes the following findings of fact, conclusions of law, and decree:

FINDINGS OF FACT

1. Katherine Wing, also known as Kitty Wing, died intestate, a resident of New York County, State of New York, on June 19, 1948.

2. On or about October 22, 1948, Rose Wing qualified as administratrix of the estate of Katherine Wing in the Surrogate's Court of New York County, New York, and has continued until the present as such administratrix.

3. On or about December 7, 1948, libelant, William Deupree, Jr., qualified as ancillary administrator of the estate of said decedent in the County Court of Kenton County, Kentucky, and on or about July 28, 1949, libelant qualified as ancillary administrator of the estate of said decedent in the County Court of Campbell County, Kentucky, and is still acting as such ancillary administrator under the appointment of said Campbell County Court.

4. On the afternoon of June 19, 1948, Katherine Wing was a guest passenger with the knowledge and consent of respondent Louis Levinson, on a twenty-two foot, eleven passenger pleasure craft then owned and operated by said Levinson on the Ohio River in Campbell County, Kentucky. There were seven passengers on the boat in addition to Miss Wing, and respondent Levinson, while Levinson's young son and another boy were being towed behind the boat respectively on an aquaplane and water

skis. The boat had been cruising about the river towing the aquaplane and water skis for about one-half hour preceding the collision which is the subject of this suit, and had been intermittently on the river during most of the afternoon.

5. At the time of said collision respondent Levinson was operating his boat in a general downstream direction on a circular course, pointing diagonally toward the Ohio shore, near the Cincinnati Yacht Club, which is located on the northeast shore of the Ohio River in Hamilton County, Ohio.

6. During the afternoon a twenty-five foot, nine passenger 140 horsepower Chris Craft Sportsman motorboat owned by respondent Mitchell A. Hall was being operated by said Hall on the same portion of the river, with two passengers on board and towing a man on an aquaplane. The boat had been intermittently on the river during the afternoon and had been on the river at least ten minutes before the occurrence of the collision in question.

7. During the afternoon the respondents had been enjoying the sport of operating their boats in close proximity to one another, and each respondent was aware of the identity of the other and of the presence of the other boat in the same river area.

8. Immediately prior to the collision Hall was operating his boat in a general upstream direction at a speed in excess of thirty miles per hour.

9. Both boats were equipped with electrically operated audible signalling devices, but neither boat operator sounded any signal prior to the collision.

10. While the boats were being so operated, they collided with one another, the bow of Hall's boat striking

the port side of Levinson's boat several feet aft of the bow stem and entering said boat far enough to break the steering wheel of the boat and the leg of respondent Levinson.

11. Respondent Levinson's boat sank within a few minutes and respondent Hall's boat was leaking so badly after the collision that it had to be beached.

12. Miss Wing was never seen alive by anyone after the collision. Examination of her body upon recovery showed that she had received a severe blow upon the head which fractured her skull; that there were fragments of wood driven into her brain; that such a blow would cause almost instantaneous death, and that there was no water in her lungs. All other occupants of both boats and the persons being towed behind the boats were accounted for immediately after the collision. Marcia Flynn, one of the passengers in Levinson's boat, received serious injuries when she was propelled from the boat by the impact and came in contact with one of the two boats as she was precipitated into the water.

13. At the time of the collision it was daylight and visibility was good. The river was about one-half mile wide at the point where the collision occurred. There were no other boats in the vicinity, and there was nothing to obstruct the vision of the respondents or the maneuvering of their boats.

14. In the moment preceding the collision, respondent Levinson, according to his own testimony, did not observe the Hall boat until the two boats were within thirty to fifty feet of one another.

15. Just prior to the collision respondent Hall observed the Levinson boat moving downstream in front of him

and to his right at a distance of five hundred to eight hundred feet. He then looked away and did not again observe the Levinson boat until the two boats were about fifty feet from one another.

16. Neither respondent reduced the speed of his boat, shut off the motor, reversed the propeller, or changed his course in time for such action to be of any effect in avoiding a collision, if at all. Both had been devoting attention to the riders being towed behind their respective boats.

17. The collision could not have occurred if either respondent had been operating his boat in a proper manner.

18. Respondent Hall, in neglecting to keep the Levinson boat under observation, failed to keep a proper lookout and failed to see the Levinson boat in time to avoid a collision.

19. Respondent Levinson failed to maintain an alert and proper lookout.

20. Both respondents failed to change course to avoid collision.

21. Each respondent, although aware of the presence of the other in the area, ignored such presence and the circumstances of danger and took no effective steps to avoid a collision.

22. There was no compliance by either respondent with the requirements of the Pilot Rules with respect to passing, passing signals, danger signals, stopping and backing.

23. Both respondents failed to comply with the statutory requirements with respect to passing, speed, stopping, reversing and right of way.

24. Decedent was a high school graduate and a very talented dancer, earning from fifty-five to seventy dollars per week during the weeks she worked. She had not reached

her full maturity as a dancer and had the prospect of a good many gainful years before her.

25. The sum of thirty thousand dollars is fair and reasonable compensation to decedent's estate for her wrongful death.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of the action.

2. There was no fault or negligence on the part of libelant's decedent.

3. There was negligence on the part of both respondents which proximately caused the death of libelant's decedent and for which respondents are liable as joint tort feasors.

4. There are no mitigating circumstances to be taken into account in assessing damages.

5. Libelant is entitled to recover from respondents the sum of thirty thousand dollars.

DECREE

It is, therefore, ordered, adjudged, and decreed that libelant recover from both respondents, jointly and severally, the sum of $30,000.00 and his costs herein.

This decree is made and entered in lieu of the decree previously entered herein on January 16, 1952, which is hereby vacated.

MAC SWINFORD, *Judge.*

NOTICE OF APPEAL

(Filed 2/29/52)

Notice is hereby given that respondents, Louis Levinson and Mitchell A. Hall and each of them appeal to the United States Court of Appeals for the Sixth Circuit from the

findings of fact, conclusions of law and judgment (final decree) entered herein on February 1, 1952 which gave libelant judgment against respondents, jointly and severally in the sum of $30,000.00 and costs; and that respondents, and each of them, similarly appeal from the order of this Court entered herein on May 15, 1951 overruling respondents demurrers to the libel as amended and the order of this Court entered herein on July 18, 1951 striking paragraph (5) from each of the answers of respondents to the libel as amended which paragraph (5) each pleaded the Statute of Limitations in bar of libelants' right to recover.

LESTER AND RIEDINGER,
By CHAS. E. LESTER, JR.
Proctors for Respondent,
Louis Levinson

BLAKELY, MOORE & BLAKELY
By MARION W. MOORE
Proctors for Respondent,
Mitchell A. Hall

Receipt of a copy of the foregoing Notice of Appeal is acknowledged this 29th day of February, 1952.

DEUPREE & DEUPREE
NICHOLS, WOOD, MARX & GINTER
Proctors for Libelant.

ASSIGNMENT OF ERRORS

(Filed 2/29/52)

Now come Louis Levinson and Mitchell Hall, respondents, and each of them and say that in the record and proceedings in this cause and in the judgment (final de-

cree) entered herein there is manifest error in the following particulars:

(1) The Court erred in entering an order on May 15, 1951 overruling respondents' demurrers to the libel as amended.

(2) The Court erred in striking paragraph five (5) from each of the answers of respondents to the libel as amended, which paragraph five (5) each pleaded the Statute of Limitations in bar of libelants' right to recover.

(3) The Court erred in finding that on or about December 7, 1948 libelant William Deupree, Jr. qualified as Ancillary Administrator of the estate of the decedent, Katherine Wing, in the County Court of Kenton County, Kentucky.

(4) The Court erred in decreeing that the libelant recover from both respondents, jointly and severally, the sum of $30,000.00, and his costs.

WHEREFORE respondents, and each of them, pray that said judgment (final decree) be reversed and a decree entered sustaining respondents' demurrers to the libel as amended and overruling libelant's motion to strike paragraph five (5) from each of the answers of respondents and for such other and further relief as may be proper in the premises.

LESTER & RIEDINGER
By CHAS. E. LESTER, JR.
Proctors for Respondent,
Louis Levinson

BLAKELY, MOORE & BLAKELY
By MARION W. MOORE
Proctors for Respondent,
Mitchell A. Hall.

Receipt of a copy of the foregoing Assignment of Errors is acknowledged this 29th day of February, 1952.

DEUPREE & DEUPREE
NICHOLS, WOOD, MARX & GINTER
Proctors for Libelant.

ORDER

(Entered: 3/4/1952)

This February 29, 1952 came the Respondents, by counsel, Blakely, Moore and Blakely and Lester & Riedinger, and offers for filing notice of Appeal and Assignment of Errors, which are orders filed and noted of record.

MAC SWINFORD, *Judge.*

STIPULATION

(Filed: 3/24/1952)

It is hereby stipulated by and between the proctors for the respective parties hereto that the following shall be included in the Transcript of Record on appeal:

1. Libel—in admiralty.
2. Answer—respondent Levinson.
3. Answer—respondent Hall.
4. Affidavit of libelant to sue in forma pauperis.
5. Special demurrer of respondent Levinson.
6. Special demurrer of respondent Hall.
7. Motion for leave to amend libel.
8. Amended libel.

Stipulation

9. Order filing motion and amended libel.
10. Order—pre-trial conference.
11. Order on pre-trial conference.
12. General demurrer—Levinson.
13. General demurrer—Hall.
14. Order sustaining general demurrers.
15. Memorandum of Court.
16. Motion for judgment on pleadings.
17. Judgment.
18. Mandate of United States Court of Appeals for Sixth Circuit.
19. Opinion of United States Court of Appeals for Sixth Circuit.
20. Order of May 15, 1951, setting aside judgment and overruling demurrers.
21. Answer respondent Levinson to libel as amended.
22. Answer respondent Hall to libel as amended.
23. Motion to strike from answers to amended libel.
24. Order of July 18, 1951.
25. Demurrer of libelant to Paragraph (7) of answer of respondent Levinson to amended libel.
26. Order of September 26, 1951.
27. Reply to answers.
28. Order of November 29, 1951.
29. Order of November 30, 1951.
30. Transcript of Court's opinion filed January 15, 1952.
31. Findings of fact, conclusions of law and decree filed February 1, 1952.
32. Notice of appeal filed February 29, 1952.
33. Assignment of errors filed February 29, 1952.

34. Order of March 4, 1952, filing notice of appeal and assignment of errors.
35. Stipulation for record on appeal.

CHARLES E. LESTER,
Proctor for Respondent-Appellant,
Louis Levinson.

MARION W. MOORE
For BLAKELY, MOORE & BLAKELY
Proctors for Respondent-Appellant,
Mitchell A. Hall.

NICHOLS, WOOD, MARX & GINTER
Proctors for Libelant-Appellee,
William Deupree, Jr., Ancillary
Administrator of the Estate of
Katherine Wing, Deceased.

STIPULATION AS TO RECORD

To the Clerk of the U. S. District Court
Covington, Ky.

The foregoing transcript of record for use in the United States Court of Appeals for the Sixth Circuit, upon the appeal in this action wherein William Deupree Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, is the Libelant and Louis Levinson and Mitchell A. Hall are the Respondents in Admiralty Action No. 364 Covington Division, has been jointly prepared by counsel for the parties to the appeal, as called for by the Stipulation as to Record, and this is your authority for treating

the foregoing pages as such transcript of Record upon the appeal and for certifying it accordingly.

NICHOLS, WOOD, MARX & GINTER,

By .....,
Attorneys for the Libellant,

LESTER AND RIEDINGER,

By .....,
Attorneys for Respondent,
Louis Levinson,

BLAKELY, MOORE AND BLAKELY,

By .....,
Attorney for Respondent,
Mitchell A. Hall.

CLERK'S CERTIFICATE

I, A. B. Rouse, Clerk of the United States District Court for the Eastern District of Kentucky, do hereby certify that foregoing pages constitute a true, Transcript of Record as called for by the Stipulation of Counsel, in the action of William Deupree Jr., etc., Libellant v. Louis Levinson, et al., Respondents, as the same is of record and on file in my said office.

Witness my hand and the official seal of said Court this the day of May, 1952.

A. B. ROUSE, *Clerk.*

By .....,
GEORGE F. REGAN, *Deputy Clerk.*

PROCEEDINGS IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(October 17, 1952—Before: HICKS, ALLEN and McALLISTER, JJ.)

This cause is argued by Charles E. Lester for appellants and by Robert S. Marx for appellee and is submitted to the Court.

JUDGMENT

(Filed October 20, 1952)

This cause was heard upon the transcript of record, brief of appellants and motion of appellee for a summary affirmance of the judgment appealed from and arguments of counsel.

Upon consideration of all of which the Court is of the opinion that there is no reversible error upon the record.

It is therefore, ordered and adjudged that the judgment of the District Court entered February 1, 1952, and herein appealed from, be and is in all things affirmed upon the grounds and for the reasons set forth in the opinion of the District Judge filed January 15, 1952, and the findings of fact and conclusions of law filed February 1, 1952, and upon the authority of Doupree vs. Levinson, et al, 186 Fed. 2nd, 297 CCA 6.

CLERK'S CERTIFICATE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

I, CARL W. REUSS, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Louis Levinson and Mitchell A. Hall v. William Deupree, Jr., Ancillary Admr.*, No. 11,600, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 28th day of October, A.D. 1952.

CARL W. REUSS,
Clerk of the United States Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 439

LOUIS LEVINSON and MITCHELL A. HALL, Petitioners,

vs.

WILLIAM DEUPREE, JR., Ancillary Administrator of the Estate of Katherine Wing, Deceased

ORDER ALLOWING CERTIORARI—Filed December 15, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

October term, 1952

No. 439

LOUIS LEVINSON and MITCHELL A. HALL,
Petitioners and Appellants below,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, Deceased,
Respondent and Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

CHARLES E. LESTER, JR.,
STEPHENS L. BLAKELY,
Proctors for Petitioners.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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Supreme Court of the United States

October term, 1952

No. ____

LOUIS LEVINSON and MITCHELL A. HALL,
Petitioners and Appellants below,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, Deceased,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of Louis Levinson and Mitchell A. Hall respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in admiralty filed by William Deupree, Jr., as ancillary administrator of the estate of Katherine Wing, deceased, in the United States District Court for the Eastern District of Kentucky to recover damages for the wrongful death of Katherine Wing, a resident of New York State, who died on June 19, 1948, as a result of injuries received in a boat collision on the Ohio River in Campbell County, Kentucky. Katherine Wing was a passenger in a

motor boat owned and operated by the petitioner, Louis Levinson, which collided with a motor boat owned and operated by the petitioner, Mitchell A. Hall, it being alleged in the libel that the collision was a result of the negligence of both petitioners.

The libel filed in the District Court on December 7, 1948, in addition to alleging the facts of the incident, sets forth the appointment of a domiciliary administratrix in New York on October 22, 1948, and the appointment of William Deupree, Jr., as ancillary administrator of decedent's estate by the County Court of Kenton County, Kentucky, on December 7, 1948 (R. p. 1). To the libel both petitioners on March 23, 1949, filed answers in the nature of general denials (R. pp. 4, 5, 6, 7, 8). On July 7, 1949, the ancillary administrator filed an affidavit for leave to sue in forma pauperis wherein he stated that "libelant's decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given" (R. pp. 8, 9). Petitioners immediately filed special demurrers to the libel, asserting that upon the face of the record the court was without jurisdiction to try the case, that it had no jurisdiction of the subject matter, and that the ancillary administrator did not have legal capacity to sue (R. pp. 9, 10, 11, 12). The District Court read into the libel the affidavit of the ancillary administrator for leave to proceed in forma pauperis and considered both the libel and the affidavit on the special demurrer and held that these two documents showed that the injury to decedent from which death resulted occurred in Campbell County, Kentucky, and that the decedent possessed no estate in Kenton County, Kentucky, and that therefore the appointment of the ancillary administrator in Kenton County was void and sustained the special demurrer, granting leave to the ancillary administrator to file an amended libel (R. pp. 15, 16). The amended libel tendered on July 29, 1949,

and ordered filed on September 9, 1949 (R. pp. 15, 16) alleged that on July 28, 1949, William Deupree, Jr., had been appointed ancillary administrator in Campbell County, Kentucky, and that the libel was brought by him in his capacity as ancillary administrator appointed in both Kenton and Campbell Counties, Kentucky (R. pp. 12, 13, 14, 15). In all other respects the amended libel was identical with the original one. To the libel as amended petitioners thereupon demurred generally on the ground that no cause of action was stated, again asserting as on the special demurrer that the order of the Kenton County Court appointing the administrator was void and contending further that the Campbell County appointment could not sustain the suit because made more than one year after the infliction of the fatal injury, the period of limitation on death actions in Kentucky being one year from the date of death (R. pp. 16, 17, 18). The District Court sustained the general demurrers (R. p. 19) and, upon the ancillary administrator's declining to plead further, entered judgment dismissing the libel as amended (R. p. 21).

The ancillary administrator appealed from the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit and it in an opinion dated December 22, 1950, reversed the judgment of the District Court and remanded the cause for further proceedings in accordance with its opinion (R. pp. 24 to and incl. 34).

Petition for a writ of certiorari was denied April 23, 1951, **Levinson, et al. v. Deupree, etc.**, 341 U. S. 915, 71 S. Ct. 736, 95 L. Ed. 1351.

Upon return of the case to the District Court issue was joined by the answers of respondents to the libel as amended (R. pp. 36 to and incl. 43) and respondent's reply to such answers (R. pp. 49-50), and upon the issue thus joined a trial resulted in a joint and several decree in favor of respondent and against petitioners in the sum of $30,000.00 and costs (R. p. 63).

Upon appeal by petitioners to the United States Court of Appeals for the Sixth Circuit, the decree of the District Court was on October 20, 1952, affirmed (R. p. 71).

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has jurisdiction of this proceeding under Title 28, Section 1254, U. S. C., Supreme Court Rule 38. The date of the judgment to be reviewed is October 20, 1952 (R. p. 71, Opinion below, pp. 24 to and incl. 34).

QUESTION PRESENTED

The question herein presented is whether admiralty courts, when invoked to enforce rights created by state law and unkown to admiralty, are bound by the law of such state, or the general maritime law.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(a) The United States Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. In the opinion below (R. p. 28) the court said: "Viewing the question as an open one, therefore, not ruled upon by the Supreme Court" and held the general maritime law controlling as opposed to the law of Kentucky which created the right sued upon, thereby presenting the spectacle of a double system of conflicting laws in the same state in actions founded on the same state statute. The cause of action is grounded upon Kentucky Revised Statutes Sec. 411.130 (wrongful death) and if same had been litigated in a Kentucky court would have suffered death under sentence of the statute of limitations, Kentucky Revised Statutes Sec. 413.140, as held by the Court of Appeals of Kentucky in

the case of **Vassill's Adm'r v. Scarsella**, 1942, 292 Ky. 153, 166 S. W. (2d) 64, and **Jewel Tea Co. v. Walker's Adm'r**, 1942, 290 Ky. 328, 161 S. W. (2d) 66. The opinion of the United States Court of Appeals gives one asserting a right (action for wrongful death) created by Kentucky law preferential treatment if an admiralty court be selected as the forum as compared to a litigant asserting his right under the same statute because of a terrene tort either in a court of Kentucky or a federal common law court.

(b) The United States Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. The libel in the case at bar asks enforcement of a state-created right borrowed by the admiralty. A remedy for wrongful death was unknown to the maritime law. **Lindgren v. U. S.**, 1930, 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686. It was, however, adopted by the admiralty and enforced long ago. **The Harrisburg**, 1886, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358. And, since **The Harrisburg** decision enforcement of state wrongful death statutes in the admiralty has been expressly justified (**Western Fuel Co. v. Garcia**, 1921, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210) under the "maritime but local" doctrine, i.e., the nature of the remedy is such that it does not affect the uniformity requirement in admiralty.

The opinion of the United States Court of Appeals in the instant case seems to indicate that for the sake of uniformity in the admiralty practice, the general maritime law and not the local law must be followed. The opinion ignores the "maritime but local" doctrine that uniformity in the admiralty practice is not required when the admiralty court is the forum selected to enforce a state-created right unknown to the admiralty. In **Western Fuel Co. v. Garcia**, **supra**, the court hinted that if a state creates a right, and the admiralty borrows it, then logic suggests such right ought to be taken with all its imperfections and limitations

and that the requirement of uniformity in admiralty furnishes no basis for argument to the contrary. The enforcement of such a state-created right in an admiralty court is permissible only under the "maritime but local" doctrine and is an exception to the requirement of uniformity in maritime law. (**Just v. Chambers**, 1941, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903).

This litigation is an attempt to enforce in admiralty a right created by local (Kentucky) law and the decision of the Court of Appeals is in direct conflict with the Kentucky decisions cited in (a) hereof, **Vassill's Adm'r v. Scarsella** and **Jewel Tea Co. v. Walker's Adm'r.** This conflict ought to be resolved by the Supreme Court.

WHEREFORE your Petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket, Louis Levinson and Mitchell A. Hall, Appellants v. William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, Deceased, Appellee, and numbered in said court 11,600, and that said judgment of the United States Court of Appeals for the Sixth Circuit be reversed by this Honorable Court and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

LOUIS LEVINSON,
By CHARLES E. LESTER, JR.,
Proctor for Petitioner.

MITCHELL A. HALL,
By STEPHENS L. BLAKELY,
Proctor for Petitioner.

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. ....

LOUIS LEVINSON and MITCHELL A. HALL,

Petitioners and Appellants below,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, Deceased,

Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 186 F. (2d) 297, and is printed in full in the record (R. pp. 24 to and incl. 34).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1254, U. S. C. The United States Court of Appeals has in this case "decided an important question of federal law which has not been, but should be, settled by this Court." [Supreme Court Rule 38 (5) (b)]. The United States Court of Appeals "has decided an important question of local law in a way probably in conflict with

applicable local decisions." [Supreme Court Rule 38 (5) (b)].

Judgment was entered in this case by the United States Court of Appeals on October 20, 1952 (R. p. 71).

STATEMENT OF THE CASE

A full statement of the case has been given in the Petition, and in the interest of brevity the statement is not repeated at this point.

In sustaining the special demurrer to the original libel the District Court took the view that the order of the County Court of Kenton County, Kentucky, appointing respondent ancillary administrator was void under Kentucky law under the decisions of the Kentucky Court of Appeals in **Vassill's Adm'r v. Scarsella**, 1942, 292 Ky. 153, 166 S. W. (2d) 64, and **Jewel Tea Co. v. Walker's Adm'r**, 1942, 290 Ky. 328, 161 S. W. (2d) 66, and that such void appointment did not sustain the libel.

In sustaining the general demurrer to the libel as amended the District Court did so upon the ground that under Kentucky law respondent did not obtain a valid order of the County Court of Campbell County, Kentucky, appointing him such administrator until July 28, 1949, and that therefore his amended libel which he was given leave to file on September 9, 1949, came too late in that more than a year had elapsed between the date of decedent's death on June 19, 1948, and the commencement of the action, and the cause was barred by the statute of limitations, Kentucky Revised Statutes, Section 413.140.

In its opinion the United States Court of Appeals (R. p. 28) said that if the decisions of the Kentucky courts are to be applied in this admiralty case, the judgment of the District Court must be affirmed and the critical question, therefore, is whether the decisions of the state court

are controlling, or whether what the United States Court of Appeals conceived to be the federal and admiralty law should be applied.

ERRORS RELIED UPON

The United States Court of Appeals for the Sixth Circuit erred in holding that the state (Kentucky) law is not controlling. The Court further erred in basing this view upon the ground that uniformity is in all cases required in the admiralty law, ignoring the "maritime but local" doctrine.

ARGUMENT

I

Actions for wrongful death are unknown to admiralty law. **Lindgren v. United States**, 1930, 281 U. S. 38, 50 S. Ct., 207, 74 L. Ed. 686. The cause of action for which enforcement is asked in admiralty is a right created by Kentucky law under its modern counterpart of Lord Campbell's Act, Kentucky Revised Statutes, Section 411.130, the wrongful death statute. Admiralty jurisdiction is invoked solely by reason of the alleged tort being maritime rather than terrene in character. Only the geographical fact of the incident resulting in death occurring upon a water highway of Kentucky rather than upon a turnpike or city street, enabled respondent to seek enforcement of his right in an admiralty court. **The Harrisburg**, 1886, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358.

II

The death for which recovery is sought occurred in Kentucky in Campbell County on June 19, 1948, as a consequence of injuries received by decedent in that state and county upon that date. Action for her death was barred in one year therefrom under Kentucky Revised Statutes, Sec-

tion 413.140. To toll the statute required the filing of suit within that time by a Kentucky (ancillary) administrator appointed to such office by a Kentucky county court (court of probate) having jurisdiction to make such appointment. **Kentucky Constitution,** Sections 140 and 141; **Kentucky Revised Statutes,** Section 25.110, 395.030, 394.140; **Gilbert v. Bartlett,** 1872, 72 Ky. 49, 9 Bush 49; **Commonwealth v. Central Consumer's,** 1906, 122 Ky. 418, 28 Ky. L. Rep. 1363, 91 S. W. 711; **Silbersack v. Kraft,** 1922, 194 Ky. 587, 240 S. W. 392; **Brown's Adm'r v. Louisville & Nashville Railroad Co.,** 1895, 97 Ky. 228, 17 Ky. L. Rep. 145, 30 S. W. 639; **Hall's Adm'r v. Louisville & Nashville R. R. Co.,** 1897, 102 Ky. 480, 19 Ky. L. Rep. 1529, 43 S. W. 698; **Walter's Adm'r v. Kentucky Traction & Terminal Company,** 1924, 206 Ky. 100, 266 S. W. 887; **Vassill's Adm'r v. Scarsella,** 1942, 292 Ky. 153, 166 S. W. (2d) 64; **Jewel Tea Company v. Walker's Adm'r,** 1942, 290 Ky. 328, 161 S. W. (2d) 66. Decedent was a New York resident possessed of no estate in Kentucky and under Kentucky law no county court except that of Campbell County where she was killed had jurisdiction to appoint respondent to the office of administrator. (Cases last cited.)

Under Kentucky law the attempt to commence suit based upon the order appointing respondent administrator was a nullity and did not toll the limitations statute. It was the same as if no suit at all had been filed. **Vassill's Adm'r v. Scarsella,** 1942, 292 Ky. 153, 166 S. W. (2d) 64; **Jewel Tea Company v. Walker's Adm'r,** 1942, 290 Ky. 328, 161 S. W. (2d) 66.

III

In an attempt to avoid the bar of the Kentucky limitations statute respondent obtained his appointment to the office of administrator by order of the County Court of Campbell County, Kentucky, on July 28, 1949, more than a year after the death of his decedent, and offered his

amended libel alleging his appointment by both Kenton and Campbell County courts to cure his error in filing suit based upon the void order of Kenton County Court. But under Kentucky law this availed him nothing. The holding in **Vassill's Adm'r v. Scarsella, supra**, is that such amendment does not relate back to the original pleading and does not toll the limitations statute. Under the law of Kentucky which created respondent's cause of action, his cause was dead.

IV

Respondent argued in the District Court and in the Court of Appeals that to grant or deny leave to amend is a matter of procedural and not substantive law, is controlled by the law of the forum and that under the holding of this Court in **Missouri, Kansas and Texas Ry. Co. v. Wulf**, 1913, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, the amendment is proper and relates back to the date of the filing of the original pleading so as to save the cause from the bar of limitations. With this contention the Court of Appeals agreed and if its decision is not reversed it will establish not only a double system of conflicting laws in the same state but a double system in the same court in actions founded on the same state statute. If in the case at bar the jurisdiction of the federal court had been invoked because of diversity of citizenship, the original judgment of the District Court would of necessity be affirmed under **Guaranty Trust Co. v. York**, 1945, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231. Should the mere circumstance of the fatal accident to decedent having occurred upon a water highway of Kentucky instead of a turnpike, road or street, vest respondent in a federal admiralty court with a right denied him in a federal court of common law? To answer affirmatively would do violence to **Guaranty Trust Co. v. York, supra**, which has been thought to express a federal policy (**Rose v. U. S.**, 1947, 73 F. Sup. 759, at

Page 763). The result of this litigation, founded as it is upon a state-created right, should be the same as if tried in a Kentucky court.

It is of no consequence that the rule in **Guaranty Trust Co. v. York, supra,** has as yet not been applied to a case in admiralty for wrongful death founded upon a state statute. The reason for the application of the rule exists and it ought now to be applied to the case at bar. The mere choice by respondent of a federal court forum ought not to give him any rights which are denied him in a Kentucky court. Kentucky denies the right to amend after the running of the statute of limitations. The federal courts should do likewise.

Why should not the reasoning in **Guaranty Trust Co. v. York** control here? It would be difficult to distinguish between the rule to be applied in a diversity case founded upon a state-created right and this cause of action asserted in admiralty and likewise founded upon a state-created right. It would seem incongruous to accord respondent an advantage by reason of his having chosen the United States District Court as a forum which would be denied him had he sought relief in a court of Kentucky from which Commonwealth he derives his very right to sue at all.

And there is no basis in reason to argue that uniformity in the admiralty practice requires affirmance. Uniformity is not required under the "maritime but local" doctrine. See **Just v. Chambers, supra,** where it was said:

> "Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. 'Uniformity is required only when the essential features of

an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate."

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers. The judgment or decision of the United States Court of Appeals is erroneous and should be reversed with instructions to enter a judgment affirming the original judgment of the District Court entered on October 5, 1949, as same appears at R. p. 21. In the language of Mr. Justice Frankfurter in **Guaranty Trust Co. v. York**, "The outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."

CHAS. E. LESTER, JR.,
Proctor for Petitioner,
LOUIS LEVINSON.

STEPHENS L. BLAKELY,
Proctor for Petitioner,
MITCHELL A. HALL.

Supreme Court of the United States

October Term, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
Petitioners,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent.

BRIEF OF PETITIONERS

CHARLES E. LESTER, JR.,
STEPHENS L. BLAKELY,
Proctors for Petitioners.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

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Supreme Court of the United States

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v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent.

BRIEF OF PETITIONERS

THE OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported in 186 F. (2d) 297, and is printed in full in the Record (R. 24-34).

The second Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit was entered October 20, 1952, appears at R. 71, has been forwarded to the publisher for publication, and will be reported in 199 F. (2d) 760.

JURISDICTION

The Supreme Court of the United States has jurisdiction of this proceeding under Title 28, Section 1254, U. S. C., Supreme Court Rule 38 (5) (b).

(a) The United States Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. In the opinion below (R. 28) the court said: "Viewing the question as an open one, therefore, not ruled upon by the Supreme Court" and held the general maritime law controlling as opposed to the law of Kentucky which created the right sued upon, thereby presenting the spectacle of a double system of conflicting laws in the same state in actions founded on the same state statute. The cause of action is grounded upon Kentucky Revised Statutes Sec. 411.130 (wrongful death) and if same had been litigated in a Kentucky court would have suffered death under sentence of the statute of limitations, Kentucky Revised Statutes Sec. 413.140, as held by the Court of Appeals of Kentucky in the case of **Vassill's Adm'r v. Scarsella**, 1942, 292 Ky. 153, 166 S. W. (2d) 64, and **Jewel Tea Co. v. Walker's Adm'r**, 1942, 290 Ky. 328, 161 S. W. (2d) 66. The opinion of the United States Court of Appeals gives one asserting a right (action for wrongful death) created by Kentucky law preferential treatment if an admiralty court be selected as the forum as compared to a litigant asserting his right under the same statute because of a terrene tort either in a court of Kentucky of a federal common law court.

(b) The United States Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. The libel in the case at bar asks enforcement of a state-created right borrowed by the admiralty. A remedy for wrongful death was unknown to the maritime law. **Lindgren v. U. S.**, 1930, 281

U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686. It was, however, adopted by the admiralty and enforced long ago. **The Harrisburg**, 1886, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358. And, since **The Harrisburg** decision enforcement of state wrongful death statutes in the admiralty has been expressly justified (**Western Fuel Co. v. Garcia**, 1921, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210) under the "maritime but local" doctrine, i.e., the nature of the remedy is such that it does not affect the uniformity requirement in admiralty.

The opinion of the United States Court of Appeals in the instant case seems to indicate that for the sake of uniformity in the admiralty practice, the general maritime law and not the local law must be followed. The opinion ignores the "maritime but local" doctrine that uniformity in the admiralty practice is not required when the admiralty court is the forum selected to enforce a state-created right unknown to the admiralty. In **Western Fuel Co. v. Garcia**, supra, the court hinted that if a state creates a right, and the admiralty borrows it, then logic suggests such right ought to be taken with all its imperfections and limitations and that the requirement of uniformity in admiralty furnishes no basis for argument to the contrary. The enforcement of such a state-created right in an admiralty court is permissible only under the "maritime but local" doctrine and is an exception to the requirement of uniformity in maritime law. (**Just v. Chambers**, 1941, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903.)

This litigation is an attempt to enforce in admiralty a right created by local (Kentucky) law and the decision of the Court of Appeals is in direct conflict with the Kentucky decisions cited in (a) hereof, **Vassill's Adm'r v. Scarsella** and **Jewel Tea Co. v. Walker's Adm'r.** This conflict ought to be resolved by the Supreme Court.

(c) The United States Court of Appeals has decided a federal question in a way probably in conflict with the ap-

plicable decision of the Supreme Court of the United States in **Just v. Chambers, supra**, and **Standard Dredging Corporation v. Murphy**, 1943, 319 U. S. 306, 309, 63 S. Ct. 1067, 87 L. Ed. 1416, in not applying the doctrine that, "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved."

STATEMENT OF THE CASE

This is a suit in admiralty filed by William Deupree, Jr., as ancillary administrator of the estate of Katherine Wing, deceased, in the United States District Court for the Eastern District of Kentucky to recover damages for the wrongful death of Katherine Wing, a resident of New York State, who died on June 19, 1948, as a result of injuries received in a boat collision on the Ohio River in Campbell County, Kentucky. Katherine Wing was a passenger in a motor boat owned and operated by the petitioner, Louis Levinson, which collided with a motor boat owned and operated by the petitioner, Mitchell A. Hall, it being alleged in the libel that the collision was a result of the negligence of both petitioners.

The libel filed in the District Court on December 7, 1948, in addition to alleging the facts of the incident, sets forth the appointment of a domiciliary administratrix in New York on October 22, 1948, and the appointment of William Deupree, Jr., as ancillary administrator of decedent's estate by the County Court of Kenton County, Kentucky, on December 7, 1948 (R. 1). To the libel both petitioners on March 23, 1949, filed answers in the nature of general denial (R. 4-8). On July 7, 1949, the ancillary administrator filed an affidavit for leave to sue in forma pauperis wherein he stated that "libelant's decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given" (R. 8-9). Petitioners immediately filed special demurrers to

the libel, asserting that upon the face of the record the court was without jurisdiction to try the case, that it had no jurisdiction of the subject matter, and that the ancillary administrator did not have legal capacity to sue (R. 9-12). The District Court read into the libel the affidavit of the ancillary administrator for leave to proceed in forma pauperis and considered both the libel and the affidavit on the special demurrer and held that these two documents showed that the injury to decedent from which death resulted occurred in Campbell County, Kentucky, and that the decedent possessed no estate in Kenton County, Kentucky, and that therefore the appointment of the ancillary administrator in Kenton County was void and sustained the special demurrer, granting leave to the ancillary administrator to file an amended libel (R. 15-16). The amended libel tendered on July 29, 1949, and ordered filed on September 9, 1949 (R. 15-16) alleged that on July 28, 1949, William Peupree, Jr., had been appointed ancillary administrator in Campbell County, Kentucky, and that the libel was brought by him in his capacity as ancillary administrator appointed in both Kenton and Campbell Counties, Kentucky (R. 12-15). In all other respects the amended libel was identical with the original one. To the libel as amended petitioners thereupon demurred generally on the ground that no cause of action was stated, again asserting as on the special demurrer that the order of the Kenton County Court appointing the administrator was void and contending further that the Campbell County appointment could not sustain the suit because made more than one year after the infliction of the fatal injury, the period of limitation on death actions in Kentucky being one year from the date of death (R. 16-18). The District Court sustained the general demurrers (R. 19) and, upon the ancillary administrator's declining to plead further, entered judgment dismissing the libel as amended (R. 21).

The ancillary administrator appealed from the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit and it in an opinion dated December 22, 1950, reversed the judgment of the District Court and remanded the cause for further proceedings in accordance with its opinion (R. 24-34).

Petition for a writ of certiorari was denied April 23, 1951, **Levinson, et al. v. Deupree, etc.**, 341 U. S. 915, 71 S. Ct. 736, 95 L. Ed. 1351.

Upon remand to the District Court the general demurrers to the libel as amended were overruled in accordance with the mandate of the Court of Appeals (R. 35), issue was joined by the answers of petitioners to the libel as amended (R. 36-43) and respondent's reply to such answers (R. 49-50), and upon the issue thus joined a trial resulted in a joint and several decree in favor of respondent and against petitioners in the sum of $30,000.00 and costs (R. 63).

Upon appeal by petitioners to the United States Court of Appeals for the Sixth Circuit, the decree of the District Court was on October 20, 1952, affirmed (R. 71).

ASSIGNMENT OF ERRORS

The United States Court of Appeals for the Sixth Circuit erred:

(1) In holding that the state (Kentucky) law is not controlling;

(2) In refusing to extend the doctrine of **Erie R. Co. v. Tompkins**, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, and **Guaranty Trust Co. v. York**, 1945, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231, to this case in admiralty for wrongful death founded upon a state (Kentucky) statute;

(3) In refusing to hold that uniformity in the admiralty practice is required only when the essential features of an exclusive federal jurisdiction are involved as held by this

Court in **Just v. Chambers** and **Standard Dredging Corporation v. Murphy**, both supra, and in each of which the "maritime but local" doctrine was again applied.

SUMMARY OF ARGUMENT

This case requires the determination of the question whether admiralty courts, when invoked to enforce rights created by state law and unknown to admiralty, are bound by the law of such state, or the general maritime law. The argument of petitioners is (1) that respondent's right to sue for wrongful death of his decedent upon the navigable waters (Ohio River) of Kentucky is given him by Kentucky Revised Statutes Sec. 411.130, (2) that absent such statute respondent would have no cause of action, wrongful death actions being unknown to admiralty as held in **The Harrisburg**, supra, (3) that upon the state of the pleadings as appear in the Transcript of Record herein, respondent's case under Kentucky law would have suffered death under sentence of the limitation statute, Kentucky Revised Statutes Sec. 413.140, if litigated in a Kentucky court as held by the Court of Appeals of Kentucky in **Vassill's Adm'r v. Scarsella**, and **Jewel Tea Company v. Walker's Adm'r**, both supra, (4) that Kentucky having created respondent's right to sue and admiralty permitting its enforcement under the "maritime but local" doctrine (**Just v. Chambers**, supra), such permissive enforcement is taken with all its imperfections and limitations (**Western Fuel Company v. Garcia**, supra), and the requirement of uniformity in admiralty furnishes no basis for argument to the contrary, and (5) that since Kentucky created respondent's right to sue but denies recovery because of limitations, respondent's choice of a federal court to litigate such state-created right should not give him advantage denied by Kentucky courts, and the rule of **Erie Railroad v. Tompkins**, and **Guaranty Trust Company**

v. York, both supra, should be here applied to the end that "The outcome of litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."

ARGUMENT

Preliminary

The basis of the jurisdiction of the United States District Court to entertain this cause is founded upon the following:

(1) United States Constitution Article III, Section II.

(2) Kentucky Revised Statutes Sec. 411.130 (Lord Campbell's Act in Kentucky).

(3) A valid order of a Kentucky county court appointing administrator (**Vassill's Adm'r v. Scarsella** and **Jewel Tea Co. v. Walker's Adm'r**, both supra).

(4) The filing of a libel by such administrator appointed by a county court having jurisdiction and the issuance of process and service thereof upon petitioners.

Absent any of the foregoing the District Court was without jurisdiction of either the cause or the persons of petitioners.

Except for Section II of Article III of the Constitution of the United States no federal court could have jurisdiction in admiralty. Courts of the United States are of limited jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred upon them. 35 C. J. S. 784, Sec. 6, Notes 38 and 39.

Without (2), Kentucky's modern counterpart of Lord Campbell's Act, the wrongful death statute, respondent had no cause in any court, either state or federal. This has ever been the rule as first stated by the United States Supreme Court in **The Harrisburg**, supra, which has been consistently followed by the courts since its decision in the

year 1886 down through **Just v. Chambers**, supra, and **American Stevedores v. Porello**, 1947, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011.

The last line of Subsection 1 of Kentucky Revised Statutes Sec. 411.130 is in this language: "The action shall be prosecuted by the personal representative of the deceased."

Since the chose in action for the wrongful death of respondent's decedent is vested in the personal representative, absent (3), a valid order of a Kentucky county court appointing an administrator, there would be no controversy. Such order must be valid. **Vassill's Adm'r v. Scarsella** and **Jewel Tea Co. v. Walker's Adm'r**, both supra.

Without (4) there would, of course, be no controversy at all. It needs no citation of authority to support the statement that except for the filing of the libel by an administrator having the right to file same, coupled with the issuance of process and service thereof, there would be nothing now before the Court.

All Defenses Available in a Kentucky Court in a Suit for Wrongful Death Are Equally Available in Admiralty

The cause of action attempted to be stated in the libel and amendment being founded upon Kentucky law, all limitations on that right or cause of action imposed by the Kentucky law must be given effect, and, all defenses available under Kentucky law which would bar recovery in a Kentucky court are a bar to recovery upon the same cause in a court of admiralty.

Respondent's right to and cause of action is given him by the Kentucky wrongful death statute, Kentucky Revised Statutes Sec. 411.130, the first subsection and pertinent portion of which is in this language:

> "Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from

the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased."

A few of the cases enunciating the rule just stated and which followed **The Harrisburg** are in part next hereinafter quoted.

The A. W. Thompson, 39 Fed. 115, at Page 117, decided in 1889:

> "The action rests entirely upon the state statute. Any defense, therefore, that would bar recovery in the state courts, with reference to which the statute must be deemed enacted, must be held equally good in the admiralty."

Quinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303, certiorari denied, **Bisso v. Quinette**, 199 U. S. 606, 26 S. Ct. 746, 50 L. Ed. 330, decided in 1905, after citing the wrongful death statute of Louisiana, said:

> "Without this statute the libelant could not maintain her libel. The statute must be applied in admiralty just as if the suit had been brought in the state courts, and any defenses which are open to the defendant under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel."

In **Truelson v. Whitney, etc.**, 10 Fed. (2d) 412, decided in 1926, certiorari denied, 271 U. S. 661, 46 S. Ct. 474, 70 L. Ed. 1138, it is said:

> "When such a cause of action is asserted in an admiralty court, it is subject to the same defenses which are open to a defendant under the jurisprudence of the state whose statute gives the right of action."

To the same effect are the cases of **Bloom v. Furness-Withy & Co.**, 293 Fed. 98, decided in 1923, and **O'Brien v. Luckenbach S. S. Co.**, decided by the Circuit Court of Appeals in the same year, 293 Fed. 170. In the **O'Brien** case the court quotes with approval the opinion of Judge Addison Brown in **The A. W. Thompson.** The same rule has been announced by the Court of Appeals for the Sixth Circuit in **Robinson v. Detroit & C. Steam Navigation Co.**, 1896, 73 Fed. 883, 20 C. C. A. 86.

The rule was again stated in 1921 by the United States Supreme Court in **Western Fuel Co. v. Garcia**, supra. There are but two syllabi of the **Garcia** case and we quote them:

> "1. A death upon the navigable waters of a state whose statutes give a right of action on account of death by wrongful act will, when caused by a maritime tort committed on such waters, support a libel in personam in the admiralty courts for the damages sustained by those to whom such right is given.
>
> "2. A state statute prescribing one year as the period within which the statutory action for death caused by wrongful act or negligence shall be brought governs a libel in personam, brought in the admiralty courts, for the damages sustained by those to whom such right of action is given from a death upon the navigable waters of such state, caused by a maritime tort committed on such waters."

It will be seen from the foregoing that *every defense* available in a Kentucky court to a suit brought for wrongful death is available to petitioners in a court of admiralty.

In Kentucky, Actions for Wrongful Death Must Be Brought Within One Year From the Date of Death

The limitations statute in Kentucky which bars recovery of a cause of action asserted for wrongful death is found in the general limitations statute, Kentucky Revised

Statutes Sec. 413.140, the applicable portions of which are as follows:

> "(1) The following actions shall be commenced within one year after the cause of action accrued:
>
> (a) An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice or servant."

This statute, formerly appearing in identical language as Sec. 2516 of Carroll's Kentucky Statutes, has been many times interpreted and construed by the Court of Appeals of Kentucky to mean that wrongful death actions must be commenced within one year from the date of death. This is settled law in Kentucky. A few of the many cases so holding are **Louisville & N. R. Co. v. Simrall's Adm'r,** 1907, 127 Ky. 55, 31 Ky. L. Rep. 1269, 104 S. W. 1011; **Carden Adm'r v. L. & N. R. R. Co.,** 1897, 101 Ky. 113, 39 S. W. 1027; **C. & O. Ry. Co. v. Kelly's Adm'r,** 1899, 20 Ky. L. Rep. 1238, 48 S. W. 993; **Wilson's Adm'r v. I. C. R. R. Co.,** 1906, 29 Ky. L. Rep. 148, 92 S. W. 572; **Nichols v. Chesapeake & O. Ry. Co.,** 1912, 195 Fed. 913, 917; **Jewel Tea Co. v. Walker's Adm'r,** and **Vassill's Adm'r v. Scarsella,** both supra.

The Original Libel Was Bad on Special Demurrer

The libel pleads the residence of decedent in New York and that she was killed in Campbell County, Kentucky, as a result of injuries received there upon the Ohio River and which injuries were caused by the negligence of petitioners and from which her death resulted. The libel further pleads the appointment of respondent to the office of administrator by order of the Court of Probate in and for Kenton County, Kentucky, the Kenton County Court.

It was the contention of petitioners in the District Court, in the Court of Appeals, and it is their contention here,

that the Kenton County Court had *no jurisdiction* to enter an order appointing respondent administrator. Petitioners further contended in those courts and contend here that absent such jurisdiction in the Kenton County Court that the United States District Court was *without jurisdiction* to entertain this cause. That this is the law and ever has been since the first decade of Kentucky's statehood is determined by a reference to the Constitutions of Kentucky, applicable Kentucky statutes of probate, and decisions of her court of last resort, the Court of Appeals of Kentucky.

County courts in Kentucky exist today by virtue of Sections 140 and 141 of her Constitution as adopted September 28, 1891. The two sections read as follows:

> "Sec. 140. Judge; compensation; removal from county vacates office.—There shall be established in each county now existing, or which may be hereafter created, in this state, a court to be styled the county court, to consist of a judge, who shall be a conservator of the peace, and shall receive such compensation for his services as may be prescribed by law. He shall be commissioned by the governor, and shall vacate his office by removal from the county in which he may have been elected.
>
> "Sec. 141. Jurisdiction to be uniform.—The jurisdiction of the county court shall be uniform throughout the state, and shall be regulated by general law, and, until changed, shall be the same as now vested in the county courts of this state by law."

Under the Kentucky Constitution of 1850 the present Section 140 appeared in similar language as Article IV, Sections 29 and 30, and in that instrument the present Section 141 appeared in similar language as Article IV, Section 33.

The probate jurisdiction of county courts in Kentucky is fixed by Kentucky Revised Statutes Sec. 25.110 which reads as follows:

"The county court has jurisdiction to probate wills, appoint and remove personal representatives, guardians, trustees, committees, curators and other fiduciaries, and any other jurisdiction conferred upon it by law."

Jurisdiction of a Kentucky county court to appoint an administrator is found in Kentucky Revised Statutes Sec. 395.030 which reads as follows:

"When a person dies intestate, the county court which would have had jurisdiction to probate his will, had he made a will, shall have jurisdiction to grant administration on his estate."

The particular Kentucky county court where a will may be admitted to probate is determined by a reading of Kentucky Revised Statutes Sec. 394.140 which reads as follows:

"Wills shall be proved before, and admitted to record by, the county court of the testator's residence; if he had no known place of residence in this state, and land is devised, then in the county where the land or part thereof lies; if no land is devised, then in the county where he died, or where his estate or part thereof is, or where there is a debt or demand owing to him."

County courts in Kentucky are courts of limited jurisdiction and derive all their powers from some express statutory enactment. This is the precise holding in **Gilbert v. Bartlett**, 1872, 9 Bush 49, 72 Ky. 49, and quoted with approval in **Commonwealth v. Central Consumers' Co.**, 1906, 122 Ky. 418, 28 Ky. L. Rep. 1363, 91 S. W. 711. If no grant of power is found in the probate statutes of Kentucky, then no such power exists. We quote from **Silbersack v. Kraft, et al.**, 1922, 194 Ky. 587, 240 S. W. 392, from page 395:

"County courts are now and have always been courts of limited jurisdiction and derive all their powers from

some express statutory enactment. **Gilbert v. Bartlett**, 9 Bush 49; **Freeman v. Strong**, 6 Dana 282; **Com. v. Central Consumers' Co.**, 122 Ky. 418, 91 S. W. 711, 28 Ky. L. Rep. 1363; **Chaudet v. Stone**, 4 Bush 210; **Small v. Small**, 2 Bush 45; **Kilbourn v. Chapman**, 163 Ky. 136, 173 S. W. 322; **Tull v. Geohagen**, 3 J. J. Marsh 377; **Russell County v. Hill**, 164 Ky. 360, 175 S. W. 988."

Various acts of the General Assembly of the Commonwealth pertaining to probate matters enacted pursuant to authority and direction of its four constitutions were of import similar to those now embraced in Kentucky Revised Statutes Secs. 25.140, 395.030 and 394.140.

One of the earliest references is to the Act of 1797 found in Littell's Laws of Kentucky cited as 1 Lit. 613, et seq. Reference to his act was made in the early case (1818) of **Embry v. Millar**, 1 A. K. Marshall 221, 8 Ky. 300. In this case the court was called upon to determine the validity of administration proceedings taken out on the estate of one who, prior to his death as an intestate, was domiciled in the dominions of Spain and who at the time of his death was possessed of no personalty in Kentucky. To determine the question, the court was required to inquire into *the jurisdiction of the county court* which granted administration and in passing upon the matter used this language as same appears upon page 222 of the report:

"According to the act of 1797 (1 Lit. 618), it is clear that no other county court can grant administration upon the estate of an intestate than such as might have taken probate of his will, had one been made, so that, in deciding upon the present case, it becomes material to look into the tenth section of the act cited, (1. Lit. 613.) for the purpose of ascertaining the *jurisdiction* of county courts in testamentary matters."

The italics in the foregoing quotation are ours. We use them to emphasize that the question before the court was one of *jurisdiction*, the Court of Appeals holding that in such state of case no county court in Kentucky had *jurisdiction* to grant administration.

Of similar import is the case of **Thumb v. Gresham, etc.**, 1859, 2 Metcalfe 306, 59 Ky. 306, construing Revised Statutes, p. 335, which went into effect on July 1, 1852, and was nearly identical with its modern successors, Kentucky Revised Statutes Secs. 25.110, 394.140 and 395.030. Here the Court of Appeals was again called upon to determine the *jurisdiction* of a county court to appoint an administrator for the estate of a non-resident of Kentucky who had no personal estate in Kentucky. Again the Court held the county court to be without *jurisdiction* and in so doing used this language:

> "Where there are no assets in this State belonging to a decedent who resided in another State, to be administered here, *the county courts have no jurisdiction* to grant administration; and every such grant is void, and confers no power or authority on the person appointed as administrator. It follows that the grant of administration in this case was unauthorized and void, and, therefore, that the plaintiff had no right to bring this action for a settlement of the decedent's estate." (Italics ours.)

In June of the year 1831 the court in **Drake's Adm'r v. Vaughan**, 6 J. J. Marshall 144, 29 Ky. 143, was called upon to determine the *jurisdiction* of a county court to grant administration. Upon page 146 of the report the court said, "The County Court of Fayette had *no jurisdiction* to grant administration on his estate." (Italics ours.) The third syllabus of the case is in this language:

> "Where an intestate is domiciled in a foreign country, and there dies, leaving no property in this State,

no administration can be granted in this country on his estate."

To the same effect is **Fletcher's Adm'r v. Sanders and Wier**, 1838, 7 Dana 345, 37 Ky. 345, the second syllabus of which is as follows:

"No court of this state has *jurisdiction* to grant probate of a will or letters of administration on the estate of a decedent, who, not domiciled here, died abroad—unless assets are found in this state; and then the *jurisdiction* belongs exclusively to the county where the assets are." (Italics ours.)

Other early cases under former statutes are those of **Hyatt v. James's Adm'r**, 1871, 8 Bush 9, 71 Ky. 9; **Turner's Adm'x v. Louisville & N. R. R. Co.**, 1901, 110 Ky. 879, 23 Ky. L. Rep. 340, 62 S. W. 1025, which was an action for wrongful death to a non-resident occurring in Kentucky and in which there was shown that decedent had debts due him in Boyle County and in commenting upon this situation the court said, "We are of opinion from the facts shown that there were debts due decedent by citizens of Boyle County, and therefore the county court therein *had jurisdiction* to appoint an administrator"; (italics ours) **Brown's Adm'r v. Louisville & Nashville Railroad Co.**, 1895, 97 Ky. 228, 17 Ky. L. Rep. 145, 30 S. W. 639, a wrongful death action involving a non-resident decedent where the court in speaking of the *jurisdiction* of a county court to appoint an administrator said on page 323 of the report:

"And we deem the court of the county where the injury was done and where the man died the proper court to entertain such *jurisdiction*." (Italics ours.)

Hall's Adm'r v. Louisville & Nashville R. R. Co., 1897, 102 Ky. 480, 19 Ky. L. Rep. 1529, 43 S. W. 698, a non-resident killed in Kentucky by the railroad, the court say-

ing that the county court of the county where the injuries were received was the only one having *jurisdiction* to appoint the administrator; a later case decided in 1924, **Walter's Adm'r v. Kentucky Traction & Terminal Co.**, 206 Ky. 100, 266 S. W. 887, is particularly in point here. The court again refers to the *jurisdiction* of county courts to grant administration and in discussing the situation uses this language upon page 388 of the Southwestern report:

> "From the averments of the petition it is clear that the county court of Bourbon county *had no jurisdiction* to appoint an administration of the estate of decedent, Walter, who was a resident of Fayette county, and who died there intestate; there being no facts alleged showing jurisdiction in the Bourbon county court. By special demurrer the question was made, whether the plaintiff had capacity to maintain the action. If the Bourbon county court did not have *jurisdiction* to appoint Harris administrator of the estate of Walter, a resident of Fayette county, *then he was not administrator of that estate, and if he were not administrator of that estate he had no interest in it, and could not maintain an action to recover damages for the wrongful death of Walter.*" (Italics ours.)

Petitioners' research fails to disclose any case in Kentucky in conflict with these early decisions. They all support petitioners' contention that the order of the Kenton County Court appointing respondent administrator is void because the court making same was *without jurisdiction* so to do. Further, that the District Court acquired no jurisdiction by the filing of the original libel because in effect *no administration was had in Kentucky* upon the estate of decedent.

No circuit court of Kentucky could entertain this action by respondent because it would have no jurisdiction unless the order of the Kenton County Court making such appointment was valid. **Jones' Adm'r v. Lay, et al.**, 1902,

23 Ky. L. Rep. 2113, 66 S. W. 720. This language appears in that case.

> "The Hardin county court had no authority or jurisdiction to appoint an administrator on his estate. Therefore the Hardin circuit court had no jurisdiction of this action."

Of course, if a circuit court of Kentucky lacks jurisdiction, the District Court of the United States would likewise be without jurisdiction since the foundation of the cause rests entirely in Kentucky law. Respondent, if properly appointed, could have pursued his remedy in an action at law in a Kentucky circuit court, or in admiralty. But in either event the jurisdiction of the court would be predicated upon the validity of the order appointing him as such administrator. In the instant case the order is void.

In 1942 in **Vassill's Adm'r v. Scarsella**, supra, the court said that a suit instituted by one in the position of respondent in the case at bar would "*possess no legal effect whatsoever.*" The exact language is found upon page 66 of the 166 S. W. (2d) report in these words:

> "In any event, the action as originally brought, as we have seen, was shown by the petition to be one which the plaintiff therein had no right in law to maintain, and being such, *it would logically appear to possess no legal effect whatever, and which this court so held* in the somewhat early case of **Louisville & N. R. R. v. Brantley's Adm'r**, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 29. The domestic case of **Marrett v. Babb's Ex'r**, 91 Ky. 88, 15 S. W. 4, also to the same effect, is cited in the opinion in the **Brantley** case as sustaining the conclusion therein approved. That holding (in the **Brantley** opinion) has never been departed from by any later opinion rendered by this court, but has been approved many times by subsequent opinions, which are listed in Shepherd's Kentucky Citations, page 330." (Italics ours.)

If the order of Kenton County Court possessed no legal effect whatsoever *because the court lacked jurisdiction* to enter it, then any suit attempted to be filed with such supposed order as its basis is the same as if none were commenced. That no circuit court of Kentucky did acquire jurisdiction in such case was held in **Jones' Adm'r v. Lay,** supra, and in referring to this opinion the Court of Appeals in **Jewel Tea Company v. Walker's Adm'r,** supra, said upon page 69 of the 161 S. W. (2d) report:

> "In the **Jones** case, supra, it was held that where an appointment of an administrator by a county court is void *for want of jurisdiction,* the circuit court has no jurisdiction of an action by the administrator suing under such void appointment." (Italics ours.)

If no Kentucky circuit court could acquire jurisdiction in such state of case, how could the District Court acquire such jurisdiction where the very cause of action itself is created by Kentucky law? The answer is that it could not.

In sustaining the special demurrers to the original libel (R. 9-11) the District Court read into this pleading the affidavit of respondent for leave to sue in forma pauperis which appears at R. 8-9. With the filing of this affidavit it appeared affirmatively of record that decedent had no estate in Kenton County, and, in fact, had no estate at all. The order of the District Court appearing at R. 15-16 indicates that this pauper affidavit was considered by the court in ruling on the special demurrer. It did so upon authority of **The Seminole,** 1890, 42 Fed. 924, where the court said:

> "These being facts which appear from the records of the court, and of which the court can take judicial notice without other proof than the record, I see no reason why it will not be the duty of the court, upon presentation of these facts in such a form, to dismiss the libel without compelling the claimant to await a

formal trial of the cause before presenting them to the court. I think, therefore, that the claimant may be permitted now to set forth these facts in an exceptive allegation; and upon the filing of such an allegation the libel will be dismissed, with costs."

The pauper affidavit showing no estate of decedent being filed, the court needed only to look on the record herein to determine that Kenton County Court was without jurisdiction to make the order appointing respondent administrator. To the same effect as **The Seminole** are the Kentucky cases of **McFeena's Adm'r v. Paris Home Telephone & Telegraph Co.**, 1921, 190 Ky. 299, 227 S. W. 450; **Board of Education of Cumberland County v. Jones**, 1922, 194 Ky. 603, 240 S. W. 65; **Maynard v. Allen**, 1939, 276 Ky. 485, 124 S. W. (2d) 765; **McNamara et al. v. New Horse Creek Coal Co. et al.**, 1942, 290 Ky. 276, 160 S. W. (2d) 625, and the textbook statements in Jones Commentaries on Evidence, 2nd Edition, Vol. 1, Sec. 431, page 764, and 20 Am. Jur., Sec. 86, page 104.

The Libel as Amended Did Not State a Cause of Action

The respondent, apparently perceiving his error in relying upon the void order of the Kenton County Court appointing him as administrator, on July 28, 1949, one year and forty days after death of his decedent, sought and obtained his appointment to the office of administrator by order of the County Court of Campbell County, Kentucky (R. 13). He pleaded this Campbell County appointment in his amended libel which he was by order of September 29, 1949, permitted to file (R. 15-16).

The attack made on the amended libel was by general demurrers (R. 16-18) on the ground that the amendment showed upon its face that the cause of action, if any there ever was, was barred by the Kentucky statutes of limitations. The office of demurrer was properly employed to

reach this patent defect in the pleading. **French v. Bowling**, 1905, 27 Ky. L. Rep. 639, 85 S. W. 1182; **Kentucky Coal & Timber Development Co. v. Kentucky Union Co.**, 1911, 187 Fed. 945.

The general demurrers to the libel as amended were sustained by order of September 26, 1949 (R. 19). From the memorandum of the District Judge filed on the same date (R. 19), it is apparent that he did so upon authority of **Vassill's Adm'r v. Scarsella** and **Jewel Tea Company v. Walker's Adm'r**, both supra.

Petitioners believe that the burden of respondent's argument opposing the general demurrers in the District Court, his argument in the Court of Appeals, and what he will probably present here, is that *granting leave to amend is a mere matter of procedure as distinguished from substantive law, and is therefore governed by the decisions of the federal courts even though such decisions be in conflict with those of the Court of Appeals of Kentucky.*

Petitioners' contention is that to allow the amended libel to stand against the demurrers and to relate back to the inception of the litigation, would permit respondent, by choice of a federal court, to obtain a result which would be denied him in a Kentucky tribunal; that the true test would seem to be whether a result different would obtain if the same cause between the same parties be litigated in a state as compared to a federal court. If so, the state rule must prevail under the holding of this Court in **Guaranty Trust Company v. York**, supra.

Coming now to the specific question, whether the amended libel may be related back to the date of the filing of the original libel so as to save the cause from the statute of limitations, it would seem that since the very cause of action itself is founded upon Kentucky law, that since every defense available to it in a suit in a Kentucky court is available in admiralty, there is no escape from the hold-

ing of the Court of Appeals of Kentucky in **Vassill's Adm'r v. Scarsella** and the **Jewel Tea** case. In the **Jewel Tea** case the Court on page 68 of the report in 161 S. W. (2d) stated the question as follows:

> "The first question to be determined is whether or not the order of the Webster county court appointing appellee administrator of the estate of decedent is void."

In the following paragraph of the case the Court said:

> "Since, however, the county court of Webster county was without jurisdiction to appoint an administrator of decedent's estate and the attempted appointment being void, ..."

The order of the Webster County Court was held to be void because *the County Court of Webster County was without* jurisdiction.

The unequivocal language of the Court of Appeals and the very basis for its decision is as follows:

> "We conclude, therefore, that since appellee's appointment as administrator was void he had no right to maintain this action and the court should have sustained appellants' motion to dismiss the case or peremptorily instructed the jury to find a verdict for the appellants."

That the **Jewel Tea** case in its pertinent features is an exact parallel of the case at bar is shown by the two following comparative columns:

Jewel Tea Case	**Case at Bar**
1. Decedent was a non-resident of Kentucky. (Illinois resident.)	1. Decedent was a non-resident of Kentucky. (New York resident.)
2. Death resulted in Kentucky from injuries sus-	2. Death resulted in Kentucky from injuries sus-

tained in an accident in a county other than that in which administration was taken out. (Accident in Muehlenberg County, administration in Webster County.)	tained in an accident in a county other than that in which administration was taken out. (Accident in Campbell County, administration in Kenton County.)
3. Suit filed by administrator appointed by county court other than that of county where injuries were sustained resulting in death. (Webster County.)	3. Suit filed by administrator appointed by county court other than that of county where injuries were sustained resulting in death. (Kenton County.)
4. Court of Appeals of Kentucky held appointment *void* upon the ground that Webster County Court was without jurisdiction to enter such order of appointment.	4. United States District Court (E. D. of Ky.) held appointment *void* upon the ground that Kenton County Court was without jurisdiction to enter such order of appointment.

It is significant that the Court of Appeals of Kentucky held the order of the Webster County Court to be *void*, not voidable. This Court is bound by the determination of the Kentucky Court of Appeals that in such state of fact, the inferior court (county court) was without jurisdiction to make such order. **Independent Warehouses, Inc. v. Scheele,** 1947, 331 U. S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346; where the court in its opinion said that since the New Jersey Court of Errors and Appeals had held a certain New Jersey tax law to be valid, "Its ruling is conclusive upon us."

The parallel of the case of **Vassill's Adm'r v. Scarsella** with the case at bar may be indicated in this manner:

Vassill's Adm'r v. Scarsella	**Case at Bar**
1. Decedent was a non-resident of Kentucky. (Ohio resident.)	1. Decedent was a non-resident of Kentucky. (New York resident.)

2. Death resulted in Kentucky from injuries sustained in a county other than that in which administration was taken out. (Accident in Garrard County, Kentucky, administration in Hamilton County, Ohio.)
3. Suit filed by administrator appointed by county court other than that of county where injuries were sustained resulting in death. (Hamilton County, Ohio.)
4. After the running of the statute of limitations plaintiff procured the appointment of administrator by the court of the county where injuries were received from which death resulted. (Garrard County, Kentucky.)
5. Plaintiff tendered an amended petition setting out the facts of the appointment of the administrator in the county where the injuries were received from which death resulted.
6. Objection was made by defendants to the filing of such amendment upon the ground that one year had elapsed from the time of the fatal accident to the deceased and the appointment of the administra-

2. Death resulted in Kentucky from injuries sustained in a county other than that in which administration was taken out. (Accident in Campbell County, Kentucky, administration in Kenton County, Kentucky.)
3. Suit filed by administrator appointed by county court other than that of county where injuries were sustained resulting in death. (Kenton County, Kentucky.)
4. After the running of the statute of limitations respondent procured the appointment of administrator by the court of the county where injuries were received from which death resulted. (Campbell County, Kentucky.)
5. Respondent tendered an amended libel setting out the facts of the appointment of the administrator in the county where the injuries were received from which death resulted.
6. Objection was made by petitioners to the filing of such amendment upon the ground that one year had elapsed from the time of the fatal accident to the deceased and the appointment of the administrator

tor by the county court of the county where the injuries were received from which death resulted.	by the county court of the county where the injuries were received from which death resulted.
7. The court sustained the objection of defendants and declined to permit the amendment to be filed, followed by a dismissal of the petition after plaintiff declined to plead further.	7. The court overruled the objection of petitioners and permitted the amendment to be filed, but then sustained a general demurrer to such libel as amended and dismissed same after respondent declined to plead further.

The reason for the court's opinion in the **Vassill** case in rejecting the offered amendment was because same was tendered more than a year after the time of the fatal accident to the deceased and the appointment of the administrator in the county where the injuries were received by decedent and from which his death resulted. In affirming the circuit court's rejection of the amendment offered after the running of the statute of limitations the appellate court said on page 66 of the 166 S. W. (2d) report:

> "It is, therefore, clear that the original action filed by the foreign administrator as plaintiff, not being maintainable, could not and did not have the effect to toll or suspend the running of the statute of limitations against the maintenance of the action and, of course, did not have the effect to preserve the right of action in favor of some future qualified person to maintain it, after more than a year had expired from the commission of the tort as a foundation of the action. That being true, it would necessarily follow that an attempt after limitation had run to substitute as plaintiff in the cause the name of one possessing legal authority to maintain it in lieu of the one who originally filed it—but possessing no legal authority to do so—would not relate back to the time the original action was filed by the wholly disqualified plaintiff so

as to preserve the right of the tardy qualified plaintiff to maintain the action against the local limitation statute. Such interpretation was made and applied by this court in the cases of **Faulkner's Adm'r v. Louisville & N. R. R. Co.**, supra; **Fentzka's Adm'r v. Warwick Const. Co.**, 162 Ky. 580, 172 S. W. 1060; **Bannon v. Fox**, 199 Ky. 262, 250 S. W. 966, and **Louisville & N. R. R. v. Brantley's Adm'r** (on second appeal), 106 Ky. 849, 51 S. W. 585. To the same effect also is the text in Thompson on the Law of Negligence, Vol. 6, page 148, Par. 7017."

Similarly, in the case at bar the general demurrers to the libel as amended were sustained because the amended libel setting up the appointment of the administrator in Campbell County was at a date more than a year following the fatal accident to the deceased. The applicability to the case at bar of these principles of law laid down by the Kentucky Court of Appeals in these two cases is inescapable. Under the law of Kentucky which created respondent's cause of action, his cause was dead.

Respondent argued in the District Court and in the Court of Appeals that to grant or deny leave to amend is a matter of procedural and not substantive law, is controlled by the law of the forum, and that under the holding of this Court in **Missouri, Kansas and Texas Ry. Co. v. Wulf**, 1913, 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355, the amendment is proper and relates back to the date of the filing of the original pleading so as to save the cause from the bar of limitations. With this contention the Court of Appeals agreed and if its decision is not reversed it will establish not only a double system of conflicting laws in the same state but a double system in the same court in actions founded on the same state statute. If in the case at bar the jurisdiction of the federal court had been invoked because of diversity of citizenship, the original judgment of the District Court would of necessity be af-

firmed under **Guaranty Trust Co. v. York**, supra. Should the mere circumstance of the fatal accident to decedent having occurred upon a water highway of Kentucky instead of a turnpike, road or street, vest respondent in a federal admiralty court with a right denied him in a federal court of common law? To answer affirmatively would do violence to **Guaranty Trust Co. v. York** which has been thought to express a federal policy (**Rose v. U. S.**, 1947, 73 F. Sup. 759, at page 763). The result of this litigation, founded as it is upon a state-created right, should be the same as if tried in a Kentucky court.

In **Guaranty Trust Co. v. York**, supra, at 326 U. S. at pages 108-110, the Court said:

> "Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may, at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, *it cannot afford recovery if the right to recover is made unavailable by the State* nor can it substantially affect the enforcement of the right as given by the State. (Italics ours.)
>
> "And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

"It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. **Erie R. Co. v. Tompkins** was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies **Erie R. Co. v. Tompkins** is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result. And so, putting to one side abstractions regarding 'substance' and 'procedure,' we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof. **Cities Serv. Oil Co. v. Dunlap**, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, as to conflict of laws, **Klaxon Co. v. Stentor Electric Mfg. Co.**, 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, as to contributory negligence, **Palmer v. Hoffman**, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. And see **Sampson v. Channel**, 110 F. (2d) 754. **Erie R. Co. v. Tompkins** has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.

"Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a

diversity case should follow State law. See **Morgan, Choice of Law Governing Proof** (1944), 58 Harvard L. Rev. 153, 155-158. The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there. Such particular rules of local law, however, do not in the slightest change the crucial consideration that if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery."

It is of no consequence that the rule in **Guaranty Trust Co. v. York** has as yet not been applied to a case in admiralty for wrongful death founded upon a state statute. The reason for the application of the rule exists and it ought now to be applied to the case at bar. The mere choice by respondent of a federal court forum ought not to give him any rights which are denied him in a Kentucky court. Kentucky denies the right to amend after the running of the statute of limitations. The federal courts should do likewise.

Why should not the reasoning in **Guaranty Trust Co. v. York** control here? It would be difficult to distinguish between the rule to be applied in a diversity case founded upon a state-created right and this cause of action asserted in admiralty and likewise founded upon a state-created right. It would seem incongruous to accord respondent an advantage by reason of his having chosen the United States District Court as a forum which would be denied him had he sought relief in a court of Kentucky from which Commonwealth he derives his very right to sue at all.

In argument below respondent asked the court to follow what he terms the federal rule where it might aid him, but reject such rule where it works to his disadvantage.

To illustrate: He argued the merits of the **Wulf** case to support his amended libel but airily tossed aside **Guaranty Trust Co. v. York** where it hurts. If this Court is to follow **Wulf** it cannot follow **Guaranty Trust Co.** So far as these decisions apply to the case at bar they are irreconcilable and a choice must be made between them. The **Wulf** case was one of diversity. The case at bar is in admiralty. Respondent asks the application of the rule in the *diversity* case of **Wulf** but denies the effect of the rule in the *diversity* case of **Guaranty Trust.** The case at bar in admiralty is similar in certain respects to a diversity case. As has been heretofore stated, the twin birth of admiralty and diversity jurisdiction is occasioned by Article III, Section II, of the Constitution of the United States. It has also been pointed out that where a right is being asserted by one whose cause is founded upon state statute, all defenses under the state law are available to his opponent whether such cause be in admiralty, or at law or equity, in a case of diversity. This is necessarily so in the case at bar because respondent has no cause of action except for the law of Kentucky. The United States District Court is merely a forum in which the right provided by the law of Kentucky may be enforced. So we say that opinions of the courts in diversity cases upon the point at issue here are equally applicable as opinions based upon litigation solely within the admiralty jurisdiction of the court where such diversity cases arise solely upon a cause of action founded upon state law. It is not sufficient to say that the granting or denying leave to amend is a mere matter of procedure, as distinguished from substantive law, and is therefore governed by the decisions of the federal courts even though such decisions be in conflict with those of the Court of Appeals of Kentucky. The objection to the amendment goes deeper than that. It strikes at the very right to maintain the action at all. The question for determination

is not whether the matter is substantive or procedural, *but, does it significantly affect the result of litigation for a federal court to disregard a law of Kentucky that would be controlling in an action between the same parties in a Kentucky court?*

With this thought in mind we quote from the case of **Berry v. Franklin Plate Glass Corp.**, 1946, 66 F. Supp. 863, pages 866 and 867:

> "It appears to me that it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of the United States rather than of state courts in order to gain the advantage of different laws. In other words, in all cases where the federal court is exercising jurisdiction solely because of the diversity of the citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court.
>
> "As the matter intimately affects recovery or nonrecovery, a federal court in a diversity case must follow the State law since it is more important than desirable for federal courts to achieve uniformity with state administration of State law. This objective cannot be achieved if the federal court is free to make determinations independent of state law, where freedom will, almost as a matter of law, yield a result substantially different from that which would have been obtained in the state where the federal court sits. For example, if the federal court and the state court would be situate in adjoining buildings and the action would have been filed in the state court, one rule of law would have application; while if the party litigant filed his action in the federal court, another rule of law would have application. The critical test, therefore, is whether an important difference in result will be

made possible if state law is not applied. If a different result would arise under the same facts and circumstances, the state law should control."

To the same effect is **Overfield v. Pennroad Corporation**, 1944, 146 F. (2d) 889, where Judge Jones said in his concurring opinion:

> "Federal jurisdiction of the instant cases rests solely on the ground of diversity of citizenship. The applicable law, therefore, is the law of the State local to the situs of the District Court. The rule of **Erie Railroad Co. v. Tompkins**, 304 U. S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, is equally pertinent to federal court equity suits where jurisdiction depends upon diversity of citizenship. **Ruhlin v. New York Life Insurance Co.**, 304 U. S. 202, 205, 58 S. Ct. 860, 82 L. Ed. 1290. Furthermore, a federal court, so bound, must follow the local rule of conflicts as well."

It is submitted that respondent cannot distinguish between the rule to be applied in a diversity case founded upon a state-created right and his cause of action in admiralty founded upon a state-created right. Respondent was enabled to seek relief in a court of admiralty only because of the geographical fact that the fatal accident occurred upon navigable waters within the jurisdiction of the admiralty. His case is not one within the exclusive jurisdiction of the admiralty and admiralty alone would avail him nothing in his effort to recover damages for this allegedly wrongful death. Kentucky gave him this right, not the law of admiralty or the rules of procedure in an admiralty court, neither of which would give him any relief at all. There can be no question but what the defense as presented in the District Court and by it resolved in favor of petitioners, was available to them in the courts of Kentucky. The conclusion would seem to be inescapable, that the law as enunciated by the Court of Appeals of Ken-

tucky must prevail as opposed to any rule in admiralty or diversity cases which would permit an amendment such as we find in the record in the case at bar.

There is no basis in reason to argue that uniformity in the admiralty practice requires affirmance. Uniformity is not required under the "maritime but local" doctrine. See **Just v. Chambers,** supra, 312 U. S. at page 392, where it was said:

> "Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate."

It may be argued here by respondent as it was by him in the courts below that the Kentucky statute of limitations is not a part of the statute creating the right of action and conceding that the substantive right is dependent upon Kentucky law, contend that the limitation being embodied in a general statute of limitations, such limitations statute is procedural and is not construed as conditioning rights. However, in view of the decision of this Court in **Western Fuel Company v. Garcia,** supra, it would seem to make absolutely no difference whether the statute of limitations be a part of the statute creating the right of action or whether such limitation is embraced in a general statute of limitations. In **Western Fuel Company**

v. **Garcia** suit was brought in the District Court of the United States for the Northern District of California in admiralty for wrongful death of one Manuel Souza occurring upon the navigable waters of and within the State of California. The California wrongful death statute is set forth in Deering's California Code of Civil Procedure, Section 377. This action merely creates the cause of action for wrongful death but does not limit the time within which such cause of action must be instituted. The time limit is set by a general statute of limitations embraced in Subsection 3 of Section 340 of the same code which is a general statute of limitations of California.

Garcia sued as administrator for the death of Souza relying upon the California wrongful death statute. **Western Fuel Co.** denied liability and relied upon the general statute of limitations which required an action for damages consequent upon death caused by wrongful act of negligence to be brought within one year, as does Kentucky Revised Statutes Sec. 413.140. The District Court held in favor of the administrator and awarded substantial damages; the Circuit Court of Appeals sent up the whole case to the United States Supreme Court under its direction. The holding of the United States Supreme Court was as said in 257 U. S. at page 243: *"In the present cause the District Court rightly assumed jurisdiction of the proceedings, but erred in holding the right of action was not barred under the state statute of limitations.* Accordingly, its judgment must be reversed, and the cause remanded there, with instructions to dismiss the libel." (Italics ours.)

But whether the Kentucky limitations statute conditions respondent's right under her wrongful death statute, or is considered as only procedural, is of no consequence. The rule of **Erie Railroad v. Tompkins** and **Guaranty Trust Co. v. York** compels that no substantially different result obtain whether one view or the other be correct. And Ken-

tucky law says, "No recovery to respondent." So also should be the pronouncement here. **Ragan v. Merchants Transfer & Warehouse Co.**, 1949, 337 U. S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520, would seem to compel it. There the court at pages 533-4 of 337 U. S. said:

> "But in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. See **Cities Serv. Oil Co. v. Dunlap**, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201; **Palmer v. Hoffman**, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. It accrues and comes to an end when local law so declares. **West v. American Teleph. & Teleg. Co.**, 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179, 132 A. L. R. 956; **Guaranty Trust Co. v. York**, 326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231, supra. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of **Erie R. Co. v. Tompkins** is transgressed.
>
> "We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with **Erie R. Co. v. Tompkins.**"

CONCLUSION

Unless we are to have confusion destructive of the reign of law, the opinions and judgment of the Court of Appeals must be reversed with instructions to enter a judgment affirming the original judgment of the District Court entered on October 5, 1949, as same appears at R. 21. To otherwise decide, respondent, by his choice of a federal court to enforce a right given him by Kentucky, will attain an end denied him in her courts.

It must be conceded that if the present case were in a Kentucky court it would be barred. The theory of **Guaranty Trust Co. v. York** would therefore seem to bar it here. The force of that reason is sought to be avoided by saying that it has not yet been extended to cases in the admiralty. If it has not been so extended, it ought to be.

Respectfully submitted,

CHARLES E. LESTER, JR.,
Proctor for Petitioner,
Louis Levinson.

STEPHENS L. BLAKELY,
Proctor for Petitioner,
Mitchell A. Hall.

Supreme Court of the United States

October Term, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
Petitioners,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent.

SUPPLEMENTAL MEMORANDUM BRIEF OF PETITIONERS

CHARLES E. LESTER, JR.,
STEPHENS L. BLAKELY,
Proctors for Petitioners.

THE JOHNSON & HARDIN CO., LAW PRINTERS

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Respondent.

SUPPLEMENTAL MEMORANDUM BRIEF OF PETITIONERS

Upon oral argument of this case on February 6, 1953, Mr. Chief Justice Vinson called the attention of counsel for petitioners to the case of **Ebner, et al. v. Official Board of Methodist Episcopal Church of Pineville,** 1926, 214 Ky. 70, 282 S. W. 785, and suggested to counsel that if he desired to do so, he might file memorandum discussing the *Ebner* case and Carroll's Kentucky Code of Practice in Civil Cases, Section 92.

The recollection of counsel is that the Court invited discussion of the **Ebner** case as it might apply to the case at bar.

The **Ebner** case refers to Section 92, Subsection 2, of the Civil Code and for a better understanding of this section, it is quoted as follows in its entirety:

Sec. 92. SPECIAL DEMURRER DEFINED; WAIVER; COSTS. A special demurrer is an objection to a pleading which shows—

1. COURT NO JURISDICTION. That the court has no jurisdiction of the defendant or of the subject of the action; or,

2. PLAINTIFF NO LEGAL CAPACITY TO SUE. That the plaintiff has not legal capacity to sue; or,

3. ANOTHER ACTION PENDING. That another action is pending in this State, between the same parties, for the same cause; or,

4. DEFECT OF PARTIES; WAIVER; COSTS. That there is a defect of parties, plaintiff or defendant. Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, except the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing so to make it; but a party failing so to make it when or before he files a pleading, other than a demurrer, is liable for all costs resulting from such failure.

In the **Ebner** case it was insisted that it did not appear from the petition that the official board of the church was an incorporated body; or that it had capacity to sue, as members of the board were not made parties plaintiff. The Court of Appeals of Kentucky pointed out that by Section 92, Subsection 2, of the Civil Code, the objection that the plaintiff has not legal capacity to sue must be made by special demurrer. No special demurrer had been filed in the **Ebner** case although a general demurrer had been interposed to the petition and the court held that the general demurrer was a waiver of the objection that plaintiff did not have capacity to sue as specifically provided by Subsection 4 of Section 92.

It appears from an examination of Shepard's Kentucky Citations that the latest expression of the Kentucky Court of Appeals applying the rule in the **Ebner** case and citing

it as authority is that of **Farmer v. Sales, et al.**, 1946, 303 Ky. 124, 196 S. W. (2d) 980. In this case, as in the **Ebner** case, defendants first filed a general demurrer to the petition and upon it being overruled, filed a special demurrer upon the ground that the petition showed that the plaintiff did not have legal capacity to maintain the action. The only question before the court was whether the general demurrer operated to waive the objection of want of legal capacity to sue. The court said:

> "Here, the court had jurisdiction of the subject of the action, and the only question is: Did the general demurrer operate to waive the objection for want of legal capacity to sue? We have held in numerous cases that such an objection, where the grounds appear on the face of the pleading, must be made by special demurrer, and that a general demurrer operates as a waiver. *Walton* v. *Washburn*, 64 S. W. 634, 23 Ky. Law Rep. 1008; *Bannon* v. *Fox*, 199 Ky. 262, 250 S. W. 966; *Ebner* v. *Official Board of the M. E. Church*, 214 Ky. 70, 282 S. W. 785; *Wedding* v. *First National Bank*, 280 Ky. 610, 133 S. W. 2d 931. *Cf. Gorin* v. *Gorin*, 292 Ky. 562, 167 S. W. 2d 52; *Shaw* v. *Straugh's Adm'r*, 294 Ky. 558, 172 S. W. 2d 50. It follows that the court erred in sustaining the special demurrer."

Counsel for petitioners have no quarrel with the rule announced in the **Ebner** and **Farmer** cases. These cases state the rule as counsel have always understood it to be. But it is suggested that neither of these cases militate against the argument of petitioners either in brief, or as presented orally.

It will be recalled that the original libel as it appears at R. 1-3 alleged the appointment and qualification of respondent as ancillary administrator of the estate of decedent in the County Court of Kenton County, Kentucky. This allegation is contained in Article 1 of the libel. This

allegation of such appointment and qualification in the Kenton County Court was denied by Article 1 of the answer of Levinson and by Article 1 of the answer of Hall.

Since it did not appear affirmatively in the language of the original libel that the Kenton County Court was without jurisdiction to appoint respondent administrator, petitioners could not at this stage of the proceedings attack the original libel by special demurrer. Their first opportunity to do so occurred immediately following the filing by respondent of his affidavit for leave to sue in forma pauperis as it appears at R. 8-9.

The application for leave to sue in forma pauperis was made by affidavit filed filed July 7, 1949. On this same date each petitioner filed his special demurrer and they appear at R. 9-11 and are each, except for the interchange of the names of the two petitioners, in this language:

> "The respondent, Louis Levinson, demurs specially to the libel of William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon the ground that it is apparent upon the face of the record herein (1) that this Court has no jurisdiction to try the within cause and (2) that this Court has no jurisdiction over the subject matter and (3) that the libelant has not legal capacity to sue."

Except for the affidavit of respondent for leave to sue in forma pauperis which, among other things, stated that "decedent was possessed of no estate" the special demurrers would very properly have been overruled. But, as appears from the order of the District Court entered on September 29, 1949, and appearing at R. 15-16, the District Court read the affidavit into the libel and considered its contents in ruling on the special demurrer and sustaining the special demurrer. The language of the District Court employed in making this ruling is as follows:

"The affidavit of the libelant setting forth the fact that the decedent had no property in this state at the time of her death should be considered by the Court in ruling on the special demurrer. To this ruling the libelant objects and excepts."

Petitioners did all they could, and as early as they could, to call to the District Court's attention its lack of jurisdiction to try the cause and that respondent did not have legal capacity to sue. They attacked the validity of the order of the Kenton County Court by both answer and special demurrer.

It will also be recalled that the amended libel as it appears at R. 12-15 pleaded the appointment of respondent as ancillary administrator in both the County Court of Kenton County and the County Court of Campbell County, Kentucky. Of course, the amended libel was not subject to special demurrer because unquestionably the County Court of Campbell County had jurisdiction to appoint respondent to the office of administrator and respondent under the Campbell County appointment had capacity to bring his action.

The attack made upon the amended libel was by general demurrers as same appear at R. 16-18. These general demurrers were sustained because, as the District Court said in its memorandum of September 26, 1949, appearing at R. 19:

"Under the Kentucky authorities the appointment of William Deupree, Jr., as ancillary administrator by the Kenton County Court was void. The amendment setting up his subsequent appointment by the Campbell County Court, shown on the face of the record to be more than a year after the alleged wrongful death cannot relate back to the inception of the libel proceeding and the claim is barred. *Vassill's Admr., etc.* v. *Scarsella*, 292 Ky. 153; *Jewell Tea Co., et al.* v. *Walker's Admr.*, 290 Ky. 328.

"An Order sustaining the general demurrer is this day entered."

A judgment entered October 5, 1949, and appearing at R. 21 dismissing the libel as amended was entered following respondent's declining to plead further.

Upon reversal of the judgment by the United States Court of Appeals (mandate appearing at R. 22-23), the District Court pursuant to the mandate by order appearing at R. 35 overruled petitioners' general demurrers to the amended libel and thereupon each petitioner filed answer to the libel as amended. The petitioner Levinson by Article 1 of his answer to the libel as amended denied *in toto* respondent's allegation of his appointment to the office of administrator either in the County Courts of Kenton or Campbell in Kentucky. By Article 5 of his answer Levinson specifically pleaded the statute of limitations and by Article 10 pleaded the absence of jurisdiction in the District Court to try the cause and that respondent did not have legal capacity to sue. Since his demurrer to the libel as amended had been overruled, the only way petitioner Levinson could set up those defenses was by his answer to the libel as amended.

Petitioners were prevented from offering proof in support of their plea of the statute of limitations and their plea of want of capacity of respondent to sue and their plea of want of jurisdiction in the District Court to try the cause for the reason that, on motion of respondent appearing at R. 43-46, the court by order appearing at R. 47 struck out these pleas from the answer to the libel as amended. There was nothing further petitioners could do.

Similarly, in the answer of petitioner Hall to the libel as amended, he, by Article 1, denied respondent's allegation of his appointment as administrator by the County Courts of either Kenton or Campbell in Kentucky, and by Article

5 of his answer pleaded the bar of the statute of limitations. By the same order appearing at R. 47 his plea of the statute of limitations was stricken from his answer.

That petitioners properly raised these questions in the court below is indicated by a reading of **Jewel Tea Company v. Walker's Adm'r**, 1942, 290 Ky. 328, 161 S. W. (2d) 66. In that case W. A. Walker, suing as administrator of the estate of John Walker, brought his action in the Muehlenberg Circuit Court to recover of Jewel Tea Company for the death of decedent which resulted from being struck by a motor truck of that company. The accident occurred in Muehlenberg County on March 13, 1938. Soon after the death of John Walker, W. A. Walker, a resident of Webster County, Kentucky, was appointed administrator of decedent's estate by the County Court of Webster County. A trial of the case resulted in a jury verdict and a judgment thereon in the sum of $2,000.00 in favor of the administrator, and to reverse that judgment Jewel Tea Company appealed, one of the grounds for reversal being that the appointment of W. A. Walker by the Webster County Court as administrator of the estate of the deceased was void.

It was alleged in the petition that the deceased died intestate a resident of Webster County, Kentucky, and that immediately thereafter W. A. Walker was by proper orders of the Webster County Court appointed administrator and thereupon qualified and was the duly acting qualified administrator of the estate of John Walker. The petition furthier alleged the negligent operation of the motor truck owned by Jewel Tea Company. A general demurrer to the petition was filed and without waiving same an answer was filed denying the allegations of negligence in the operation of the truck *but this answer did not deny the allegations of the petition with respect to the appointment of the administrator, or that he was the duly acting qualified administrator of the decedent's estate.*

It developed, however, by the evidence of the administrator, that his decedent was a resident of Springfield, Illinois, at the time of his death and was not a resident of Webster County, Kentucky, as alleged in the petition. The administrator resided in Providence in Webster County. The trial court ruled that evidence on the question of the residence of decedent was irrelevant and incompetent since the answer did not deny that the appellee was the duly appointed and qualified administrator of the estate of the decedent. Counsel for Jewel Tea Company stated that he did not know until that time that decedent was not a resident of Webster County, Kentucky, at the time of his death and did not know that appellee was not the legal administrator of the estate of decedent until after the trial began on that day when appellee testified, and further stated that it is now shown that the decedent was a resident of the State of Illinois at the time of his death. Counsel then moved the court to dismiss the case because the Webster County Court that appointed appellee as administrator had no authority to make such appointment because decedent was not a resident of Webster County at the time of his death, but was a resident of Springfield, Illinois, and the injury resulting in his death occurred in Muehlenberg County and, therefore, the attempted appointment of an administrator by the Webster County Court was void for want of jurisdiction. The court sustained objections to the motion on the ground that there was no denial of the allegations in the petition that decedent was a resident of Webster County at the time of his death, or that appellee was the duly qualified and acting administrator of decedent's estate and, therefore, no issue to which evidence could be directed.

Counsel for Jewel Tea Company then moved the court to discharge the jury and continue the case on the grounds of surprise, in that they did not know until the trial started that appellee was not legally appointed administrator, and

not authorized to maintain the action, and asked an opportunity to present the facts, if the court needed further facts, in support of his motion. The court again sustained objections to this motion on the ground that there was no issue made on the pleadings on the question, and further, that there was no showing that counsel could not have by the exercise of due diligence known of the facts.

In disposing of the contention that the want of capacity of plaintiff to sue was not timely raised the court had this to say:

> "It is not insisted in brief for appellee that the county court of Webster county had the right or jurisdiction to appoint an administrator of decedent's estate. He relies solely upon the fact that the allegations in the petition with respect to the appointment of appellee as administrator, as we have hereinbefore recited, were not denied. Since, however, the county court of Webster County was without jurisdiction to appoint an administrator of decedent's estate and the attempted appointment being void, we do not think that under the facts disclosed in the record, the failure of appellants to deny that appellee was legally appointed, or the legally constituted administrator of decedent's estate, constituted a waiver of the question, if it be conceded that such question could be waived, or that it gave any life or validity to such void appointment. It appears that the decedent was a stranger to appellants and the people in the community where the accident occurred and his identification was not established until the evening of the next day after he died. It was finally learned that his name was John Walker and that his brother W. A. Walker, appellee herein, lived in Providence, Webster county, Kentucky. The county court of Webster county then proceeded to appoint appellee administrator of decedent's estate. Since the statute gave jurisdiction only to the county court of the county of the residence of the decedent to grant administration and, it being alleged in the peti-

tion that decedent was a resident of Webster county, in such circumstances it was natural or reasonable for appellants to assume that decedent was a resident of Webster county. It appears that the question was raised at the first reasonable opportunity."

A situation greatly similar is presented in the case at bar. Not only did petitioners deny by their answers the appointment of respondent to the office of administrator but at their first opportunity they specifically brought it to the court's attention by their special demurrers. And they again brought respondent's lack of capacity to sue to the court's attenton by their specific pleas of their answers as hereinbefore pointed out. In the **Jewel Tea** case the answer did not deny the allegation of the appointment and qualification of the administrator yet the court held that the requirement of the rule was met by counsel bringing the matter to the court's attention upon his first opportunity so to do. If any other procedure could have been followed by counsel for petitioners in the case at bar, it is not known to them what it could be under the Kentucky or the admiralty practice.

Respectfully submitted,

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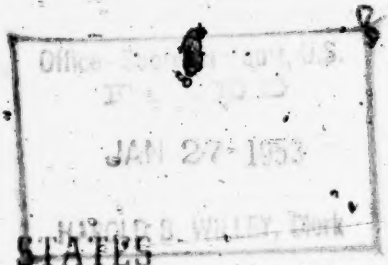

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
Petitioners,

vs.

WILLIAM DEUPREE, JR., ANCILLIARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

Statement of the Case

Katherine Wing, a resident of the State of New York, was killed on June 19, 1948, while a passenger in a motorboat owned and operated by petitioner Louis Levinson, which collided with a motorboat owned and operated by petitioner Mitchell A. Hall. The collision occurred on the Ohio River, a navigable stream, and within the jurisdiction of the United States District Court for the Eastern District of Kentucky, which district includes the county of Campbell and the adjacent county of Kenton. 28 U. S. C. 97. The death resulted from the negligent, wilful and malicious acts of both petitioners in operating their boats at an ex-

cessive rate of speed without giving proper signals and by reason of other improper conduct.

On October 22, 1948, Rose Wing, the decedent's mother, qualified as domicilary administratrix of her daughter's estate in New York. On December 7, 1948, respondent qualified as ancillary administrator of the estate of the decedent in the County Court of Kenton County, Kentucky, by taking the oath and executing bond as required by law. On the same day he filed his libel against petitioners, alleging himself to be the regular, qualified and acting ancillary administrator of the estate of Katherine Wing, deceased, setting forth the foregoing facts and seeking damages for the wrongful death of his decedent (R. 1). The action was not based upon diversity of citizenship, and could not have been so based since all the parties thereto were residents of the State of Kentucky, but was founded upon the admiralty jurisdiction of the United States court which admittedly extends to torts committed upon the Ohio River, and it is not controverted that an action for wrongful death under the Kentucky statute may be maintained in such court under such circumstances.

On March 3, 1949, each of the petitioners filed an answer denying the appointments of the New York administratrix and the ancillary administrator but not affirmatively alleging any invalidity or defect in these appointments. (R. 4, 6). On July 7, 1949, petitioners having applied to the court to take depositions, respondent filed a motion for leave to sue *in forma pauperis*, stating that "decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given" (R. 8, 9).

Immediately, upon the same date, petitioners demurred to the libel, claiming that the quoted words indicated that the Kenton County Court had no jurisdiction to appoint

respondent as ancillary administrator (R. 9, 1[illegible]). Reading the quoted language into the libel and construing it to mean that decedent was possessed of no assets whatever, the District Court sustained the demurrers and granted respondent leave to amend (R. 15, 16).

On July 29, 1949, an amended libel was filed which was identical with the original libel save that, in addition to alleging respondent's appointment in Kenton County, it likewise alleged his appointment as ancillary administrator by the Campbell County Court on July 28, 1949 (R. 12). Petitioners again demurred, contending that the Kenton County appointment was void, that the Campbell County appointment could not sustain the action because made after the running of the one-year statute of limitations and could not, under Kentucky law, relate back to the commencement of the suit (R. 16, 17). The court adhered to this view and, upon respondent's declining to plead further, dismissed the amended libel (R. 21).

The United States Court of Appeals for the Sixth Circuit, on December 22, 1950, reversed the judgment and remanded the case for further proceedings in accordance with its opinion, rendered without dissent and reported in 186 F. (2d) 297 (R. 24-34). Petition for a writ of certiorari was then filed by petitioners in this court, which petition was denied April 23, 1951, *Levinson et al.* v. *Deupree, etc.*, 341 U.S. 915.

Upon remand to the District Court the demurrers were overruled in accordance with the mandate of the Court of Appeals and, upon issue being joined, the case was tried, resulting in a decree for respondent in the sum of $30,000.00 and costs against both petitioners (R. 63) who then appealed to the Court of Appeals for the Sixth Circuit. The grounds for said appeal (R. 64, 65) were identical with those previously passed upon by the Court of Appeals and

urged upon this Court in the former petition for certiorari. Petitioners claimed simply that the prior decision of the Court of Appeals and the rulings of the District Court made in obedience thereto were erroneous. Since no new issue was raised, respondent filed no brief and moved for summary affirmance of the trial court's decree. The Court of Appeals affirmed "upon the authority of *Deupress* v. *Levinson et al.*, 186 Fed. 2nd, 297, C.C.A. 6". *Levinson et al.* v. *Deupree*, 199 F. (2d) 760 (R. 71). This court granted certiorari on December 15, 1952.

Summary of Argument

Respondent submits that the decision of the Court of Appeals was correct not only for the reasons stated in its well considered opinion but for others, equally cogent, as well. For one thing, petitioners' entire argument is based upon the contention that decedent's estate was possessed of "no" assets in Kenton County, Kentucky, and that the County Court of that county therefore had no "jurisdiction" to appoint respondent as ancillary administrator. This is an unsubstantial argument without real substance which is not supported by the record. Furthermore, even if it be assumed that there were no such assets, the Kentucky cases, despite the dictum of the Court of Appeals to the contrary, would not have had the effect of denying relief to the respondent, the supposed parallel between them and the case at bar being illusory. Correctly interpreted, the Kentucky decisions did not require the sustaining of petitioners' demurrers, but, even if this were not so, the sustaining of them was erroneous under federal procedure. The Court of Appeals correctly indicated that such would have been the case even if the litigation had arisen under the diversity jurisdiction. Since admiralty jurisdiction, not diversity, is in fact involved, the uniform procedural

requirements of the federal courts must apply, and the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and its offspring, *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945), can have no relevance. A contrary decision would not only be opposed to long established principles laid down by this court but would sever the very roots of the admiralty practice. For example, if state procedural rules were to govern, trial by jury would be required where the right has never before been recognized and the procedure provided by Congress to limit liability would be unavailable; nor would respondent, under such a holding, have been permitted to proceed *in forma pauperis*, a right granted him by federal law.

ARGUMENT

This Appeal Is a Resort to Flimsy Technicalities in an Effort to Defeat Justice

Petitioners make no argument to this court, and made no argument to the Court of Appeals, on the merits of this case. They have never claimed in either court that they were not negligent or not responsible for the death of the decedent, for the benefit of whose indigent parents the decree below was entered; nor have they asserted that that decree was excessive or contrary to the evidence. The only claim made is that respondent was improperly appointed as ancillary administrator by the County Court of Kenton County.

There is no question that under Kentucky law an ancillary administrator can be appointed to prosecute an action for wrongful death either in the county where the fatal injury occurred or in the county where assets of the decedent can be found. In this case the appointment could have been made in Campbell County since it was alleged

that the collision which caused the decedent's death occurred on the Ohio River in Campbell County. Respondent claims that the appointment could also be made, and was properly made, in Kenton County, since the right of action for wrongful death was itself an asset which was enforceable throughout the district in which it occurred and therefore supported an appointment in any county in that district, Kenton County being the county in which the federal court sat. Furthermore, respondent claims that a lack of Kenton County assets to support the appointment does not appear upon the face of the record, petitioners having offered no proof in that regard, and that a lack of jurisdiction in the County Court cannot be presumed.

The entire argument of petitioners is founded on the contention that since no assets of decedent existed in Kenton County, the County Court there was without "jurisdiction" to appoint an ancillary administrator. If technicalities are to control this case, respondent must point out that the libel showed no such lack of assets, and petitioners filed answers thereto. The demurrers were filed later, after the respondent's affidavit for leave to sue *in forma pauperis* had been filed (R. 8), and it is solely upon a statement therein that the claim of no assets is made, said statement being that "decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given." The affidavit did not show that there were no assets in Kenton County at the time of respondent's appointment, and petitioners offered no evidence to that effect at the trial. A one dollar debt to decedent would have supported the appointment, and lack of jurisdiction on the part of the County Court cannot be assumed. *Louisville Trust Co.* v. *L. & N. R. R. Co.*, 43 S. W. 698, 102 Ky. 480 (1897). *Walter's Administratrix* v. *Kentucky Traction Co.*, 266 S. W. 887, 206 Ky. 100 (1924).

Without an affirmative showing in the record that decedent possessed no asset in Kenton County at the time she was killed, the entire argument of petitioners collapses.

Furthermore, even if there had been no other assets to support the grant of letters of ancillary administration in Kenton County, the claim for wrongful death was itself such an asset. The Court of Appeals recognized (R. 27) that the claim was such an asset in Campbell County, but in fact it was such in any county, including Kenton, within the same federal district where it was enforceable. A claim "enforceable within the jurisdiction" is sufficient to furnish a basis for administration. 23 Corpus Juris 1013. Likewise a cause of action for wrongful death suffices for a grant of letters "where the cause of action arose or where it may be enforced, even though the decedent was a nonresident and left no other assets in the jurisdiction." 23 Corpus Juris 1009. 33 C. J. S. 894. In connection with the wrongful death statute the Kentucky Court of Appeals in *Austin's Adm'r.* v. *Pittsburgh, C. C. & St. L. Ry. Co.*, 122 Ky. 304, 91 S. W. 742 (1906), said at page 743:

> "Construing these sections, it has been held that where a nonresident has been killed in this state by the tort of another, administration will be granted upon his estate in this state, even for the tort, because the statute which gives the right of action to the estate of such decedent for such death, ex necessitate rei, confers jurisdiction by implication, to appoint an administrator to prosecute the suit. Brown's Adm'r. *v.* Louisville & Nashville R. R. Co., 97 Ky. 228, 30 S. W. 639."

It is important to note here that by this decision of the Kentucky Court of Appeals the right of action and the right to ancillary letters are both engendered in the same statute, the latter following as a corollary of the former, as

the court described it, "*ex necessitate rei.*" The authority to grant ancillary letters does not therefore arise from the probate and administrative statutes. Since the right of action supported a grant of letters where enforceable and since it was enforceable throughout the federal district which embraces both Kenton and Campbell Counties, either county could appoint respondent as ancillary administrator. See *Matheson* v. *United States*, 227 U. S. 540, 542 (1913). Although there is no Kentucky law directly in point on this question, the Kentucky decisions referred to by petitioners are not apposite to this case and cover situations quite different from that at bar.

Petitioners, having filed answers, and having sat back and failed to object to respondent's capacity as a Kenton County administrator until the expiration of the Kentucky one year statute of limitations, then made their attack upon respondent's qualifications. To obviate any question in connection with his capacity, respondent then applied for appointment as ancillary administrator in Campbell County, which concededly had jurisdiction since it was opposite Campbell County that the collision occurred. Not satisfied with questioning respondent's original appointment, petitioners then moved the County Court of Campbell County, Kentucky, to set aside respondent's appointment made by that court on the ground that respondent "*qualified in the Kenton County Court as administrator of the estate of said decedent and that said William Deupree, Jr., is now acting in such capacity as administrator of said estate pursuant to order of said Kenton County Court*" (see Appendix I to this brief).

That motion was filed and such representation made to the Campbell County Court following the original decision of the United States District Court sustaining petitioners' demurrers and while the appeal from the dismissal of the

action was pending in the Court of Appeals for the Sixth Circuit (see Appendix II). To the federal courts petitioners declared that the Kenton County appointment was void *while at the same time to the Campbell County Court they stated that the Kenton County appointment was valid and that respondent was acting as a Kenton County administrator.* Trifles light as air of this variety should not be permitted to deprive the penniless parents of the girl killed as the result of the acts of the petitioners from obtaining compensation for her death. The federal courts do not exist for the purpose of furnishing arenas for intellectual contests or exhibitions of counsel's ingenuity but rather stand to afford justice to parties having controversies therein. Petitioners' attempt to thwart that purpose should not be countenanced by this court.

The Amendment Permitted by the Court of Appeals Is Sanctioned by the Decisions of This Court and All Other Courts

The rule of *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570 (1913), which the Court of Appeals found applicable to the case at bar, allowing amendment notwithstanding the statute of limitations, has been applied by the federal courts at least as far back as *Hodges* v. *Kimball*, 91 F. 845 (C. A. 4, 1899). Petitioners, indeed, do not dispute the following statement in the opinion below (R. 29):

> "It is a long established rule in the federal courts that administrators are permitted to secure and perfect ancillary administration in states where the decedents were non-residents, even after the running of the statute of limitations. A lack of letters of administration may be cured or an objection of want of capacity to sue may be avoided by substitution of the proper party at any time before hearing, and later appointments of this nature relate back and validate

the proceedings from the beginning. The leading case to this effect is *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570. There plaintiff, as sole beneficiary, brought an action provided for under state law. After the statute of limitations had run, the petition was amended to set up a federal cause of action and was filed by plaintiff both individually and as administratrix. The Supreme Court pointed out that, aside from the capacity in which plaintiff brought the action, there was no substantial difference between the original and the amended petitions, and held that the action was not barred. Here, too, the amendment in no way changes the issues, and in no way prejudices the appellees. Also in the instant case there is no change in the party bringing the action, but simply an amendment as to his capacity. The liberality of amendment in the federal courts goes even farther than this, allowing an actual change in the party plaintiff. *Lema* v. *Baltimore & Ohio Rd. Co.*, 128 Fed. 191; *Quaker City Cab Co.* v. *Fixter*, 4 Fed. (2d) 327 (C. A. 3); *Quin* v. *Kansas City Southern Ry. Co.*, 8 Fed. Supp. 78; *Jacobs* v. *Pennsylvania Rd. Co.* 31 Fed. Supp. 595; *Van Doren* v. *Pennsylvania Rd. Co.* 93 Fed. 260 (C. A. 3)."

The court noted (R. 33) that amendments are similarly allowed in admiralty cases.

Amendment is permitted even when the substantive law to be applied is that of one of the few states which would not allow amendment in somewhat similar situations in its own courts. *Mexican Central Railway Co.* v. *Duthrie*, 189 U. S. 76, 78 (1903). *Montgomery Ward & Co.* v. *Callahan*, 127 F. (2d) 32 (C. A. 10, 1942), allowed an amendment changing plaintiff's capacity in a diversity case after the running of the statute of limitations, saying:

"The right to recover is substantive and is therefore controlled by the law of Kansas. Erie R. Co. v. Tompkins, supra. How appellee was required to proceed, in

whose name the action must be filed, is procedural and therefore determined by the law of the forum."

As dictum the court then added, "But even if the law of Kansas is applied, the result is the same." In a more recent case the same court allowed an amendment under the federal civil rules, bringing in new parties, although "the rule in the state courts of Kansas is different." *Gas Service Co.* v. *Hunt*, 183 F. (2d) 417, 419 (C. A. 10, 1950).

But the precise amendment allowed in this case by the Court of Appeals has never, to respondent's knowledge, been denied by any court. As applied to the facts at bar, the "federal rule" is the universal rule. Petitioners cannot point to a single case in Kentucky or anywhere else wherein an improperly qualified personal representative seeking damages for wrongful death has been forbidden to amend his pleading, irrespective of the statute of limitations, to show his subsequent proper appointment. The Supreme Court of Ohio, in *Douglas Adm'x.* v. *Daniels Bros. Coal Co.*, 135 Ohio St. 641, 22 N. E. (2d) 195, 123 A. L. R. 761 (1939), succinctly stated the rule in its first syllabus (which is the law of the case in Ohio):

> "Where a widow institutes an action, as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administratrix *after the expiration of the statute of limitation applicable to such action, the amended petition will relate back* to the date of the filing of the petition, and *the action will be deemed commenced within the time limited by statute.*" (Emphasis added.)

As recently as December 17, 1952, the Ohio court quoted the foregoing syllabus in *Kyes, Adm'r.* v. *Pennsylvania Rd.*

Co., 158 Ohio St. 362, —— N. E. (2d) ——, wherein it allowed substitution, after the running of the statute of limitations, of an entirely different personal representative for the original ancillary administrator whose capacity had been challenged. The wrongful death statute, said the court, "is procedural and remedial in its nature, and in conformity with the general rule it should be construed liberally." 158 Ohio St. at page 365.

There is no Kentucky case contrary to the rule of the *Douglas* case, which is the rule of the *Wulf* case and of countless other federal decisions, a number of which are mentioned in the opinion of the Court of Appeals (R. 29, 30). The *Wulf* case is, in fact, followed by the Kentucky Court of Appeals. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Goode*, 163 Ky. 60, 173 S. W. 329 (1915).

The Kentucky Cases Relied upon by Petitioners Do Not Sustain Their Position

Petitioners fasten their hopes to the claim that the amendment permitted by the Court of Appeals would not have been allowed if the case had been tried in the state courts of Kentucky and that the state rule should be applied in the present proceeding under *Guaranty Trust Co.* v. *York*, *supra*. Before discussion of the applicability or non applicability of the *Guaranty Trust* case to the case at bar, the Kentucky cases upon which petitioners rely should be analyzed. It is claimed that *Jewel Tea Co.* v. *Walker's Adm'r.*, 290 Ky. 328, 161 S. W. (2d) 66 (1942), and *Vassill's Admr.* v. *Scarsella*, 292 Ky. 153, 166 S. W. (2d) 64 (1942), would be fatal to respondent's recovery in a state court of Kentucky. In fact, however neither case deals with a situation like the present one.

The *Jewel Tea* case is very far from being, as petitioners

assert (Brief, p. 23), "an exact parallel of the case at bar." It was concerned not with the law applicable to a nonresident or to a right of action in the federal courts but simply with the aplication of the Kentucky administration statutes to the estates of *resident* decedents. These statutes, as hereinabove noted, do not furnish the ground for appointment of an ancillary administrator seeking to prosecute a wrongful death action. Such ground exists under the death statute "*ex necessitate rei.*" In the *Jewel Tea* case the fatal accident occurred in Muhlenburg County, Kentucky; the administrator resided in Webster County, Kentucky, and was appointed in that county upon a petition for letters which *falsely* alleged that the decedent had resided there at the time of his death *whereas, in fact, he had never resided in Kentucky.* No administrator was ever appointed in Muhlenburg County, where the death occurred, and no attempt was made to amend the pleadings, so that the question of relation back was not presented, nor was there any question of limitations involved. Moreover, the plaintiff admitted that his appointment was void (claiming defendant had waived objection to the defect), and the remarks of the Kentucky court relative to the "void" appointment should be considered in the light of such admission. Less than three months after the *Jewel Tea* case the same court held that, where a person was granted letters of administration upon her false allegation that she was the widow of the decedent, such appointment was *voidable only* and the *acts performed by her while acting under such appointment were valid. Louisville & N. R. Co.* v. *Turner*, 290 Ky. 602, 162 S. W. (2d) 219 (1942). Finally, the *Jewel Tea* case did not decide that in an action for wrongful death of a nonresident of Kentucky the petition for ancillary administration must and can be filed only in the county where the death or injury occurred.

The alleged parallel of the *Vassill* case with the case at bar (Petitioners' Brief, p. 24) is likewise nonexistent. The case holds that where an out-of-state administrator of a nonresident who was killed in Kentucky brought suit *without qualifying there,* an ancillary administrator appointed in the county where the death occurred could not become a plaintiff more than one year after the date of death. There was no appointment whatever in Kentucky before the period of limitations expired, "void," "voidable," or otherwise. No action was brought within one year by any Kentucky administrator or any person purporting to act under color of a Kentucky appointment so that no discussion of a "void" appointment was involved. The court did, however rely on its earlier decision in *Fentzka's Adm'r.* v. *Warwick Const. Co.,* 162 Ky. 580, 172 S. W. 1060 (1915), a case in which a "void" appointment was later construed as *voidable* by the Court of Appeals for the Sixth Circuit in *Salyer* v. *Consolidation Coal Company,* 246 Fed. 794 (C. A. 6, 1918), cert. den. 246 U. S. 669 (1918).

In the very recent decision of *Cozine* v. *Bonnick,* —— Ky. ——; 245 S. W. (2d) 935, (1952), the Kentucky Court of Appeals had occasion to refer to the *Vassill* case; and to the construction placed upon its doctrine by the Court of Appeals for the Sixth Circuit, in a case where suit was brought on behalf of a minor by a next friend who was not a resident of Kentucky, and after the running of the statute of limitations, amendment was sought to allow the former minor, who had by then attained majority, to prosecute the action. The court held that a next friend must be a resident but that the trial court erred in forbidding the substituted plaintiff to proceed notwithstanding the statute of limitations. Of the *Vassill* case the court said, at page 937 of 245 S. W. (2d):

> "The appellee supports the trial court's ruling that the effect is not retroactive principally upon Vassill's

Adm'r. v. Scarsella, 292 Ky. 153, 166 S. W. 2d 64. That was a suit for damages filed by a foreign administrator for the wrongful death of a non-resident. The circuit court ruled that he was without legal authority to maintain the action and that the filing of it was without legal effect. A domestic, ancillary, personal representative was thereafter appointed by a Kentucky county court. She tendered an amended petition which adopted the allegations of the petition and asked that she be made party plaintiff and permitted to prosecute the action. The court did not allow the amendment because more than a year had elapsed since the cause of action arose, and it was therefore barred by the statute of limitations. We affirmed. Other cases to the same effect are cited. The doctrine that a suit instituted by a disqualified personal representative is in effect no suit at all and may not be amended by a properly qualified representative was questioned in Salyer *v.* Consolidation Coal Co., 6 Cir. 246 F. 794, a case transferred to the federal court because of diversity of citizenship. Other cases of this court were pointed to as holding such an original appointment to be merely voidable, so that there could be a substitution. However, the court followed federal procedure and held the substituted qualified administrator could prosecute the case as having been filed before the section was barred. We need not go into that particular question here for there is a material difference between a suit by a personal representative of a deceased person and a suit by an infant by or through a next friend."

The Kentucky court thus failed either to agree or disagree with the construction placed on its former decisions relating to "void" appointments by the Court of Appeals for the Sixth Circuit.

The *Cozine* case, which allowed relation back of an amended petition to a petition filed by a next friend who was not qualified under Kentucky law, may be distinguishable from the case at bar, but respondent submits that the

situation there presented is much closer to that now before this court (if it be assumed that respondent's appointment in Kenton County was irregular) than were the circumstances in the *Vassill* case wherein no pleading was ever filed, within the period of limitations, by anyone either qualified or purporting to be qualified under Kentucky law.

Neither of the Kentucky cases relied upon by petitioners touches the question at bar. Neither adds anything to the *Fentzka* case, which the Court of Appeals distinguished in the *Salyer* case. Neither can be cited as opposing the rule enunciated by the Ohio court in the *Douglas* case upon facts identical with those at bar, and neither is contrary to the established federal rule as applied to a case like that now before the court. Thus, even if this were a diversity case, which it was not and could not have been, and even if it be assumed that the *Guaranty Trust* case required the application of state law to the pleading of this admiralty suit, the decision of the Court of Appeals was correct.

This Case May Be Determined Purely As a Procedural Matter

In their brief (pp. 8, 12 ff.) petitioners urge at length the argument that the Kenton County Court was without "jurisdiction" to appoint respondent. This argument addresses itself toward the appointment of resident administrators to administer the assets of Kentucky decedents, rather than of ancillary administrators to prosecute wrongful death claims on behalf of the next of kin of nonresident decedents; but, in fact, no question of jurisdiction is involved in this case. All that the court need decide is the procedural question of respondent's right to amend his pleading.

It is claimed by petitioners that the District Court de-

rived its jurisdiction from the federal constitution, the Kentucky wrongful death act, "a valid order of a Kentucky court appointing administrator," and the commencement of suit by such administrator. Indubitably respondent's rights are founded upon the constitutional and statutory provisions mentioned and enforcement thereof is dependent upon a proper court action, but to state that without a valid order there would have been no jurisdiction below is confusing and incorrect. A defendant may show in defense that a plaintiff has no right to sue under his pleadings or the facts, but, as this court said in *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28 (1901), that is no defect of jurisdiction, but of title. The court further said:

> "It is as much so as if it were sought to dismiss an action of ejectment for the want of jurisdiction, by showing that the plaintiff had no title to the land in controversy. At common law neither an infant, an insane person, married woman, alien enemy, nor person having no legal interest in the cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction."

And in *General Investment Co.* v. *New York Central R. R. Co.*, 271 U. S. 228, 230 (1926), the court said:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits . . . Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction . . . If it be resolved against him, the

appropriate decree is a dismissal for want of merits, not for want of jurisdiction."

In *McCandless* v. *Furlaud*, 293 U. S. 67 (1934), objection was made that the trial court was without jurisdiction because the plaintiff, an ancillary receiver, had never been validly appointed as such. Rejecting this argument, this court held that the objection "goes not to the jurisdiction of the District Court in this suit, but to the legal capacity of the plaintiff as ancillary receiver." The Court's opinion also noted that federal appellate courts have refused to entertain the objection, when not made in the trial court, "that the plaintiff, an executor or administrator, had not secured ancillary administration," thus making it crystal clear that no jurisdictional question was involved. The court cited *Leahy* v. *Haworth*, 141 F. 850 (C. A. 8, 1905), which held that where a British executor filed suit as executor in a federal court in Nebraska before qualifying as such and did not so qualify until after the running of the statute of limitations, the subsequent qualification related back and avoided the bar of the statute. Numerous cases were reviewed showing that an administrator may sue as such without appointment provided that he takes out letters before trial. These decisions make it evident that there is no question of lack of jurisdiction present in the case at bar.

This supposed jurisdictional question underlies all of petitioners' "preliminary" argument (Brief, pp. 8, 9) as well as that portion of their argument which contends for the vulnerability of the original libel to demurrer (Brief, pp. 12-21). Petitioners fail to deny or recognize that the death claim itself was an asset sufficient to support the Kenton County appointment, even if there were not a nickel's worth of other assets there—the lack of which, if true, does not appear in the record. The County Court is pre-

sumed to have jurisdiction, and the assertion of lack of jurisdiction of the trial court, in any event, is contrary to the rulings of this court above mentioned.

So far as petitioners' claim of the availability to them of all defenses available in a Kentucky court, including the defense of the Kentucky statute of limitations (Brief, pp. 1, 12), is concerned, it is sufficient to state that respondent has never questioned the rule of *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921), or contended for the application to the case at bar of any rule of laches or statute of limitations other than Kentucky's. It is noteworthy, however, as the Court of Appeals pointed out (R. 31, 32), that that statute (Kentucky Revised Statutes, Sec. 413.140) is not a part of the statute creating the right of action for wrongful death (Kentucky Revised Statutes, Sec. 411.130), that such a statute is procedural only, and that the Kentucky Court of Appeals has recognized that such a limitation is not to be treated as part of the right. It should also be pointed out that the wrongful death statute, a portion of which is quoted by petitioners (Brief, pp. 9, 19), not only provides that the action shall be prosecuted by the personal representative of the deceased but also directs how the proceeds shall be distributed:

> "(2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:
>
> * * * * * * *
>
> "(d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one moiety each, if both are living . . . " Kentucky Revised Statutes, Sec. 411.130.

It is thus apparent that, the recovery not being a part of decedent's general estate, the personal representative is

but a nominal party and that the parents of the deceased girl are the real parties in interest. In *Vaughn's Adm'r.* v. *Louisville & N. R. Co.*, 297 Ky. 309, 179 S. W. (2d) 441, 445, (1944), the Kentucky court said:

> "This action is brought under KRS 411.130 which gives a cause of action to a personal representative for the sole benefit of named beneficiaries. The recovery in an action for wrongful death is not for the benefit of the estate but for the next of kin, here the decedent's father and mother. The substance of the present action is that the surviving beneficiaries are suing, since they only are entitled to the benefit of a recovery. The statutory authority of the administrator, where the decedent leaves any of the kindred named in the statute, is to sue for the benefit of the next of kin. *The administrator is merely a nominal plaintiff. The real parties in interest are the beneficiaries whom he represents.*" (Emphasis added.)

This court, in *Stewart* v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445, 449 (1897), observed that a wrongful death statute is remedial "and, like all such statutes, should be so construed as to give instead of withholding the remedy intended to be provided . . . The important part of the section is that which gives a right of action, and not that part which provides who may enforce it; the latter is an *incidental* provision."

Petitioners claim (Brief, p. 21) that the amended libel showed upon its face that the cause of action was barred by the statute of limitations. That this is incorrect and that the face of the amended libel shows no such thing may be determined by this court by a reading of the pleading in question (R. 12). In this circumstance a demurrer could not be properly sustained on the ground of limitations. After a review of federal cases, it is stated in 4 *Cyclopedia of Federal Procedure*, 2d Edition, Sec. 1319, that "A fair

general conclusion to draw from all the authorities seems to be that ordinarily the defense of limitations must be interposed by an answer, unless the legal effect of the bar of limitations conclusively appears from the complaint." The recent Kentucky decisions go even further than this and hold that generally the defense of limitations cannot be raised by demurrer even when the lapse of time appears on the face of the pleading. Thus the Kentucky court in *Markwell* v. *Kahlkoff*, 258 Ky. 231, 79 S. W. (2d) 984 (1935), said:

> "Though, formerly, it was held that a demurrer should be sustained where the petition showed on its face that the action was barred, Johnson v. Robertson, 45 S. W. 523, 20 Ky. Law Rep. 135; Bradford v. Bradford, 43 S. W. 244, 19 Ky. Law Rep. 1245, it is now the settled rule that, with certain exceptions not here material, the statute must be pleaded, and the question of limitation cannot be raised by demurrer. Davies' Ex'r. v. City of Louisville, 159 Ky. 252, 166 S. W. 969; Davidson v. Kentucky Coal Lands Co., 180 Ky. 121, 201 S. W. 982; Baker v. Begley, 155 Ky. 234, 159 S. W. 691; Lyttle v. Johnson, 213 Ky. 274, 280 S. W. 1102."

Crady v. *Hubrich*, 299 Ky. 461, 185 S. W. (2d) 949, 951 (1945), states: "In this jurisdiction the defense of limitations cannot, as a general rule, be raised by demurrer but must be pleaded." The 1946 decision of *Woolery* v. *Smith*, 302 Ky. 725, 196 S. W. (2d) 115, repeats that the defense of limitations must generally be pleaded (except in actions for relief from fraud, etc.) and cites "some of the later cases holding that a limitation defense must be pled in the general run of litigation."

Nowhere in this case is there an attack upon the merits of respondent's cause of action. Complaint is made only upon the procedural question of his right to amend. That right is granted by the federal courts and not forbidden by

the law of Kentucky. The court need decide nothing else. Even if such amendment were forbidden in the state courts, however, it should nevertheless be permitted in this admiralty suit.

This Suit in Admiralty Is, and Should Be, Unaffected by State Rules Concerning Amendment and Relation Back of Pleadings

Petitioners assert (Brief, p. 7) that "This case requires the determination of the question whether admiralty courts, when invoked to enforce rights created by state law and unknown to admiralty, are bound by the law of such state, or the general maritime law." No such question is involved here. Certainly, for example, in a wrongful death suit in an admiralty court founded on a state statute, contributory negligence would defeat the libelant's cause if it were a bar under the state law. The case at bar, however, contains no such issue but involves purely a procedural matter. The real question raised by petitioners here is: Must a federal admiralty court follow state procedural rules? This court long ago answered that question in the negative, and the general principle of the supremacy of admiralty procedural law, as the original opinion below indicates, is established.

Petitioner's sole claim is that a federal admiralty court should be required to follow state decisions as to amendment and relation back of pleadings in a death case through an extension of the rule of *Erie Rd. Co.* v. *Tompkins*, supra, as applied in *Guaranty Trust Co.* v. *York*, supra. The court below pointed out, while answering this contention, that "Even in diversity cases, while the substantive right created by statute is controlled by state law (*Erie Rd. Co.* v. *Tompkins*, supra) procedural matters are governed by the law of the forum" (R. 32). The decisions of this court show that state law has not been allowed to interfere with admir-

alty procedure. The ruling below, that an amended libel changing the capacity of the nominal party libelant related back to the filing of the original libel notwithstanding the statute of limitations (which is not contained in the state death statute and hence not a limitation upon the right conferred), involves only a question of federal procedure.

In *The H. E. Willard*, 52 Fed. 387, 389 (1892), Mr. Justice Gray, sitting as Circuit Justice and citing decisions of this court, said: "The admiralty jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislature of a state. When a right maritime in its nature has been created by the local law, the admiralty courts of the United States may doubtless enforce that right, *according to their own rules of procedure.*" (Emphasis added). Thus, such courts may enforce a right of action given by a state death statute in a limitation of liability proceeding. *The Hamilton*, 207 U. S. 398 (1907). Referring to the decision in the *Erie* case, this court has said, in a case involving maritime issues arising in a state court:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all *substantive* rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the state." *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245 (1942). (Emphasis added).

This court has not extended the *Erie* doctrine beyond diversity cases. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 307 (1947). See concurring opinion of Mr. Jus-

tice Jackson in *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 467 (1942). Petitioners' sole claim is that it should be extended to this admiralty case. However, a recent writer on this subject declares not only that the *Erie* doctrine has no place in admiralty but also that it should not even apply in diversity cases involving maritime issues. Stevens, *Erie R. R.* v. *Tompkins and the Uniform General Maritime Law*, 64 Harvard Law Review 246, 267 ff. (December, 1950).

The principle which petitioners would have this court overturn is one of venerable lineage. In *Laidlaw* v. *Oregon Ry. & Nav. Co.*, 81 Fed. 876 (1897), the Circuit Court of Appeals for the Ninth Circuit held that whether an intervenor in an admiralty suit, seeking compensation under state law for wrongful death, had asserted his claim within the time allowed by the state statute of limitations was to be determined according to admiralty procedure and that a state statute providing that an action is deemed commenced when summons is served or issued to the sheriff for service "is a mere statutory provision respecting the remedy, and that, too, it would seem, in actions at law. It is inapplicable to the procedure of admiralty courts." The court quoted from Justice Story's opinion in *The Chusan*, Fed. Cas. No. 2,717 (1843), where, in discussing the exercise of admiralty and maritime jurisdiction, he says: "The states have no right to prescribe the rules by which the courts of the United States shall act, or the jurisprudence which they shall administer."

This court, in *Steamboat Company* v. *Chase*, 16 Wall. 522, 534 (1872), while holding that a remedy under a state statute for wrongful death upon the navigable waters of a state might be sought in the state courts, in a federal court under the diversity jurisdiction, or in a federal ad-

miralty court, used this pertinent language in contrasting the common law jurisdiction with that of admiralty:

> "Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he must conform to the system of pleading and to the rules of practice, and of evidence, which prevail in the chosen forum. State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the Circuit Courts as well as in the State courts, but the rules of pleading, practice, and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decisions of this court. State legislatures may regulate the practice, proceedings, and rules of evidence in their own courts, and those rules, under the 34th section of the Judiciary Act, become, in suits at common law, the rules of decision, where they apply, in the Circuit Courts."

The Conformity Act (former 28 U. S. C. 724) expressly excluded admiralty causes from its requirement that state practice be followed in civil actions in the federal courts. A leading authority on this branch of the law has written: "In an action in admiralty under a State statute creating a right of action for death by wrongful act, the same principles of decision are applied as would be applicable in a common law action, but matters of pleading, practice and evidence are governed by the rules and decisions in admiralty." 1 *Benedict on Admiralty*, 6th ed., sec. 148. Thus although state law and decisions control the right of action and limitations thereon in such a suit, the procedure is that of an admiralty court where the issues and question of damages are not submitted to a jury. (See *State of Maryland to the Use of Szczesek* v. *Hamburg-American Steam Packet Co.*, 190 F. 240 (1911), affirmed *sub nom. Atlantic Transport Co. of West Virginia* v. *State of Maryland to*

the Use of Szczesek, 193 F. 1019 (1912), affirmed 234 U. S. 63 (1914).

Guaranty Trust Co. v. *York*, supra, upon which petitioners fasten their hopes, has no applicability to the case at bar. The court in that case held simply that a federal diversity court in an equity suit must apply a state statute of limitations. The opinion there recognized that even before *Erie R. Co.* v. *Tompkins*, supra, federal courts had been deemed bound by such state statutes in common law cases and generally applied them in equity cases. Likewise this court had held that they were bound by state limitations in admiralty cases founded upon state wrongful death statutes. *Western Fuel Company* v. *Garcia*, supra. But it has never been suggested that established rules relating to amendment and relation back of pleadings in such cases are subject to the dictates of the state courts, and nothing in *Guaranty Trust Co.* v. *York* is susceptible of such interpretation. That case contains a ruling on the question of a limitation of a state-created right when federal jurisdiction is invoked by reason of diversity of citizenship. The rules of pleading and procedure under the admiralty jurisdiction clearly are unaffected by that decision and by the rule of its parent, the *Erie* case. It is not difficult to understand the surprise evident in the remarks of a District Court in 1947, six days after this court's decision in *United States* v. *Standard Oil Co.*, supra, that "this is the very first time I have ever heard it even asserted that the Erie Railroad Co. case has the slightest bearing on suits in admiralty." *Central American Shipping & Trading Corp.*, v. *Mercantile Ship Repair Co.*, 73 F. Supp. 779, 780 (D. C. E. D. N. Y.). Certainly it should have no such bearing with respect to procedural matters. Such would appear to be the implication of the language above quoted from *Garrett* v. *Moore-McCormack Co.* It is

perhaps worthy of mention that *Bochantin* v. *Inland Waterways Corp.*, (D. C. E. D. Mo. 1950) 9 F. R. D. 592, discussed in the original opinion of the Court of Appeals below (R. 34) and which was squarely on the point here in question, subsequently resulted in judgment for the libelant, 96 F. Supp. 234 (1951), and dismissal of an appeal. *Inland Waterways Corporation* v. *Bochantin*, 191 F. (2d) 734 (C. A. 8, 1951).

Petitioners would have the court disregard the *Wulf* case, which dealt with a matter of pleading similar to that at bar, and apply the *Guaranty Trust* case, which held a state statute of limitations applicable to an equity suit (a proposition with which respondent has no quarrel), for they say (Brief, p. 31), "If this Court is to follow *Wulf* it cannot follow *Guaranty Trust Co.* So far as these decisions apply to the case at bar they are irreconcilable and a choice must be made between them."

There would seem to be considerable doubt whether there is any conflict between the *Wulf* and *Guaranty Trust* cases even in diversity situations. One wonders with respect to the relevancy of the *Guaranty Trust* decision to the present controversy even if the case at bar were not in admiralty. The effect of petitioners' contentions is that federal courts in adjudicating state created rights must always and in all respects apply state rules. Certainly that is not the law. All defenses, say petitioners, that were available to them in a state court were likewise available in the federal court. But difference in procedure can lead to different results even in diversity cases. To mention but one example: a party can obtain a verdict upon concurrence of nine jurors in a state court but not in a federal court. Is state law to be applied to that situation? If not, why is it to be applied to rules governing the amendment of pleadings? It should not be forgotten

that this whole question has arisen because of an application to proceed *in forma pauperis* under a federal statute.

Perhaps it is worth mentioning that although the *Guaranty Trust case* has never been deemed applicable to an admiralty case, the *Wulf* case has been applied by admiralty courts to cases under state death statutes. *Weldon* v. *United States*, 65 F. (2d) 748 (C. A. 1, 1933). *Bochantin* v. *Inland Waterways Corp.*, supra.

Steamboat Company v. *Chase*, supra, is still the law. Nor is there any reason why the hitherto prevailing rule should be changed or why the doctrine of the *Erie* or *Guaranty Trust* cases should be applied to this admiralty suit when such application would defeat, not serve, the justice which the admiralty courts strive to attain. The reasons for applying *Erie* do not obtain in the admiralty courts where procedural rules must be uniform. The case quoted by petitioners in an attempt to prove the contrary, *Just* v. *Chambers*, 312 U. S. 383 (1941), is very far from sustaining such a contention. The court there held that, just as an admiralty court would enforce a state wrongful death statute for a tort committed upon the navigable waters of a state, so also would it enforce the provisions of a state survival statute in such a case. The case, however, was brought as a limitation of liability proceeding under an Act of Congress, and its procedure was thus governed by uniform federal rules. To hold that state procedure is to be paramount in cases wherein the substantive rights are governed by local law would be to draw into question the possibility of instituting limitation of liability proceedings.

"Admiralty procedure," as the Court of Appeals pointed out (R. 32), "does not conform to the laws of the various states, but is uniform throughout the country; the practice

or procedure is extremely liberal and the rules governing such practice are even less technical than those of equity." The destruction of this uniformity in the name of state dominion would jeopardize or destroy some of the distinguishing aspects of the admiralty courts, which have their own rules of procedure and methods of appeal, including trial by the court or a master rather than by jury, and other characteristic features. It has not heretofore been suggested that this be done, and it ought not to be done now: the admiralty procedure should not be "one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port." *Workman* v. *New York*, 179 U. S. 552, 558 (1900).

Conclusion

There is no jurisdictional question in this case. Suit was duly commenced by respondent as ancillary administrator duly qualified with every color of right. At most he was a nominal party with no interest in the damages, being merely a vehicle to allow recovery by the real parties in interest, the parents of the girl whose life was snuffed out. A reversal of the judgment of the Court of Appeals would not only permit the petitioners entirely to escape the consequences of their tortious acts but would also be contrary to hitherto well settled rules of law. The petitioners were in court before the expiration of the period of limitations. Whether the ancillary appointment should have been made in Kenton County or Campbell County was a highly technical question without effect on the substantial rights of either the real libelants or the petitioners; it had no effect upon the cause of action, of which the limitations statute formed no part. Indeed, when respondent was appointed in Campbell County, petitioners sought to set aside that appointment on the ground that respondent had "qualified"

as administrator in Kenton County and was "acting in such capacity."

The amendment permitted by the Court of Appeals merely changed the capacity of respondent as nominal libelant. Such amendments are uniformly allowed in wrongful death cases by the federal courts in accordance with their liberal and enlightened policy of deciding cases upon the substantial merits and of not allowing form to triumph at the expense of substance. The state courts, too, overwhelmingly permit similar amendments, and no Kentucky case takes a contrary position as applied to the facts at bar.

The record does not show a complete lack of assets in Kenton County. Even if it did, the claim for wrongful death itself would suffice to support the appointment there, and, in any event, respondent acted with color of right in filing the suit. Under Kentucky law, his acts performed while so acting were valid. The amendment of respondent's pleading was not forbidden by any Kentucky case. However, even if it were forbidden in a state court, Kentucky rules of pleading do not control the right to amend in this case, which is governed by the uniform procedural rules of admiralty as administered by the federal courts.

The statute of limitations is designed to prevent injustice by the barring of stale claims, not to foster it by the denial of rights upon technical defenses. In *New York Central and Hudson River Railroad Co.* v. *Kinney*, 260 U. S. 340, 346 (1922), this court in a decision founded upon the *Wulf* case (opinion of the court by Mr. Justice Holmes) said:

> ". . . when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist,

and we are of opinion that a liberal rule should be applied."

The judgment should be affirmed.

Respectfully submitted,

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HARRY M. HOFFHEIMER,
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APPENDIX I

CAMPBELL COUNTY COURT

IN THE MATTER OF ESTATE OF KATHERINE WING, also known as KITTY WING, INTESTATE

Motion

Louis Levinson and Mitchell A. Hall move for an order setting aside and holding for naught the order heretofore entered herein on July 28, 1949, appointing William Deupree, Jr., as administrator of the estate of the above named decedent and in support hereof represent to the Court that prior to said date and on December 7, 1948, said William Deupree, Jr., qualified in the Kenton County Court as administrator of the estate of said decedent and that said William Deupree, Jr., is now acting in such capacity as administrator of said estate pursuant to orders of said Kenton County Court.

(S.) CHAS. E. LESTER, JR.
for LESTER & RIEDINGER
Attorneys for Louis Levinson and Mitchell A. Hall

APPENDIX II

CAMPBELL COUNTY COURT

IN THE MATTER OF ESTATE OF KATHERINE WING, also known as KITTY WING, INTESTATE

Notice

William Deupree, Jr., Administrator of the Estate of Katherine Wing, also known as Kitty Wing, deceased, is hereby notified that Louis Levinson and Mitchell A. Hall have filed their motion in the Campbell County Court for an order setting aside and holding for naught the order of

July 28, 1949, appointing said William Deupree, Jr. as such administrator and that said motion will be for hearing before said Court on Tuesday, the 17th day of January, 1950, at 2:30 o'clock P. M.

This notice dated at Newport, Kentucky, this the 10th day of January, 1950.

CHAS E. LESTER, JR.,
for LESTER & RIEDINGER,
Attorneys for Movants.

(6045)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
Petitioners,

vs.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPREME COURT OF THE UNITED STATES

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No. 439

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At the conclusion of oral argument in this case the Chief Justice asked counsel for petitioners whether petitioners had not waived the right to object to respondent's capacity as Kenton County administrator by filing answers to the original libel before demurring; he also asked what counsel had to say about *Ebner et al.* v. *Official Board of Methodist Episcopal Church of Pineville*, 214 Ky. 79, 282 S.W. 785 (1926). This brief is filed in answer to Supplemental Memorandum Brief of Petitioners which they have filed in response to these questions.

For the purpose of this brief it will be assumed that respondent's appointment in Kenton County was irregular and that Kentucky law is controlling with respect to plead-

ing, neither of which assumptions is conceded to be true by respondent.

It must be pointed out, also, as a preliminary matter that petitioners' claim of the invalidity of the Kenton County appointment is founded on the claim that respondent's affidavit for leave to sue *in forma pauperis* stated that "decedent was possessed of no estate" (Petitioners' Supplemental Memorandum, p. 4). What the affidavit actually said (R. 9) was that "decedent was possessed of no estate *out of which costs or expenses herein can be paid or from which security therefor can be given*"—a very different statement, which did not show the lack of any assets either at the time of death or at the time the affidavit was made, over a year later. Thus the District Court's language (quoted on p. 5 of Petitioners' Supplemental Memorandum) that the affidavit set forth "the fact that the decedent had no property in this state at the time of her death" is erroneous.

At the outset it should be observed that the Kenton County Court's action is presumed to be proper until the contrary is affirmatively shown. If the jurisdiction of a county court be collaterally attacked, the burden is on the party raising the issue to show lack of jurisdiction. *Jacob's Adm'r* v. *Louisville and Nashville Railroad Company*, 73 Ky. 263 (1874). *Bartlett* v. *Buckner's Adm'r*, 265 Ky. 747, 97 S.W. (2d) 805, 809 (1936). When a county court has appointed an administrator, the presumption is in favor of the jurisdiction of the court to make the appointment even though the intestate was a resident of another state. *Brents* v. *Vittatoe's Adm'r*, 8 Ky. Law Rep. 427 (1886).

Furthermore, even if an administrator's appointment is defective, his acts performed while the appointment is in effect can be valid and binding. In *Taylor* v. *Tibbatts*, 52 Ky. 177, the Kentucky Court of Appeals called an admin-

istrator's appointment "void" and "a perfect nullity" (where a will was later probated and an executor appointed). "But," added the court (p. 184), "the acts of such an administrator, before probate of the will, may be valid, so far as the rights of strangers are affected by them."

Thus the Kentucky court in effect holds that a defectively appointed administrator is an administrator *de facto* whose acts possess legal validity. An appointee not entitled to be an administrator according to statute can sue for wrongful death and bind the estate until the order of appointment is reversed. *Buckner's Adm'r v. Louisville and N. R. Co.*, 120 Ky. 600, 87 S.W. 777 (1905). In *McFarland's Adm'r v. Louisville and N. R. Co.*, 130 Ky. 172, 113 S.W. 82 (1908), a woman was appointed administratrix upon her false representation that she was the widow of the decedent, whereupon she settled a death claim with the defendant railroad. The court held that under the usual rule and the Kentucky statute the woman's acts performed during her appointment were valid, and the settlement barred action by an administrator who was later properly appointed. In *Louisville and N. R. Co. v. Bays' Adm'x*, 220 Ky. 458, 295 S.W. 452 (1927), the defendant claimed the appointment of plaintiff as administrator was void because made by a judge pro tem. who was without authority to act. The court, however, held that the judge had "color of title to this office, he was at least a *de facto* judge pro tem. of the Harlan County court, and the acts of *de facto* officers are valid as to third parties. They cannot be attacked collaterally."

The statute above referred to is Kentucky Revised Statutes, Section 395.330, which reads as follows:

"*Acts prior to revocation of powers valid.*

"Where an order of administration is set aside or letters of administration revoked, or where any execu-

> tor or administrator is removed, or the will under which he acted is declared invalid, all previous sales of personal estate made lawfully by the executor or administrator and with good faith on the part of the purchaser and all other lawful acts done by the executor or administrator, shall remain valid and effectual."

Louisville & N. R. Co. v. *Turner*, 290 Ky. 602, 162 S.W. (2d) 219 (1942), discussed on page 13 of respondent's original brief, is a recent application of the rule that the acts of a defectively appointed administrator are valid.

Turning now directly to the question of the efficacy of petitioners' special demurrers, filed after they had filed answers consisting of general denials, one observes that, under Kentucky law, there are two permissible methods of raising the issue of a plaintiff's capacity. The first method is by special demurrer. Kentucky Civil Code of Practice, Section 92. A special demurrer under this section, however, can only be sustained if the defect complained of appears on the face of the pleading. *Webb* v. *Kersey*, 255 Ky. 217, 73 S.W. (2d) 4 (1934). Petitioners (Supplemental Memorandum, p. 3) quote additional authority to this effect and concede (p. 4) that they could not have filed special demurrers to respondent's original libel because no demurrable defect appeared upon its face. They contend that they could demur only after respondent's affidavit for leave to sue *in forma pauperis* was filed. However, even if that affidavit could be construed as showing a lack of proper appointment of respondent, it did not change the rule that a special demurrer lies only to a pleading which shows a ground therefor "*on its face.*" *Webb* v. *Kersey*, *supra*. Respondent's proper remedy for the supposed defect was the second statutory method provided for attacking capacity to sue: by answer pursuant to Kentucky Civil Code of Practice, Sec. 118, which reads as follows:

> "*Special demurrer may be presented by pleading; waiver.* A party may, by an answer or other proper pleading, make any of the objections mentioned in Section 92, the existence of which is not shown by the pleading of his adversary; and failure so to do is a waiver of any of said objections, except that to the jurisdiction of the court of the subject of the action."

The statute contemplates that such an answer contain an affirmative plea relative to incapacity, not simply a general denial. In *Louisville & N. R. Co.* v. *Herndon's Adm'r*, 126 Ky. 589, 104 S. W. 732, 735 (1907), where the defendant claimed that the plaintiff had no authority to act as administrator, the court said:

> "The petition alleged that it qualified as such administrator, and the presumption of law is that the court required it to duly qualify, unless there was something in the order which negatived that fact. We are of opinion that the allegations of the petition show a prima facie right in appellee to prosecute this action. Appellant did not controvert, in its answer, these allegations, nor allege any fact showing its incapacity to maintain this action. It has contented itself by filing a general demurrer to the petition, which, in our opinion, was not the proper method to reach the question. Section 92, Civ. Code prac. provides: 'A special demurrer is an objection to a pleading which shows, first that the court has no jurisdiction of the defendant or of the subject of the action; or, second, that the plaintiff has not legal capacity to sue. * * *. Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, except the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing to make it.' Appellant, having failed to file this special demurrer, and also having failed to make a plea in its answer showing the incapacity of appellee to maintain this action, waived

its right to now present this question. See the case of Warfield v. Gardner's Adm'r, 79 Ky. 583."

The *Ebner* case, which followed and applied the case just quoted from, held, on a claim of no capacity to sue, that, "by section 92, subsec. 2, of the Code, the objection that the plaintiff has not legal capacity to sue must be made by a special demurrer. No special demurrer was filed. The general demurrer was a waiver of this objection under subsection 4 of section 92."

Again in *Wedding* v. *First National Bank of Chicago*, 280 Ky. 610, 133 S. W. (2d) 931, 933 (1939), the Kentucky Court of Appeals held that an alleged defect in the petition with respect to plaintiff's capacity was waived by the filing of a general demurrer. Such defect "could only be attacked by a special demurrer or by a pleading under section 118 of the Civil Code of Practice, and appellant filed no special demurrer, nor any plea under section 118."

In short, where there are grounds for a special demurrer, "the question must be raised in some proper way (i.e., by special demurrer), where the facts appear on the *face* of the petition, or by *answer in the nature of a plea in abatement*, where such facts do not appear. Civil Code §§92 and 118 . . . In the present case the question was not raised by special demurrer or by answer by way of plea in abatement. On the contrary, both defendants answered to the merits without saving the question. That being true, the defense that the United Mineworkers of America were not suable in the name of the association was waived." *United Mine Workers of America* v. *Cromer*, 159 Ky. 605, 167 S. W. 891, 892 (1914).

To recapitulate: Petitioners concede that no special demurrer would lie to the libel as filed. Since a special demurrer can be sustained only when the defect complained of appears on the face of the pleading, the introduction

into the record of the affidavit for leave to sue *in forma pauperis* did not make such demurrers proper. The affidavit did not indicate respondent's incapacity, but even if it had so indicated, special demurrers did not lie. Had they been proper, they would have been waived by the prior filing of petitioners' general denials. Petitioners never sought to amend their answers to incorporate therein a plea in abatement under section 118 (which plea was the only proper remedy open to them to assail the alleged defect), and they accordingly waive their right to object. This being true, petitioners' discussion concerning their pleading to the amended libel is irrelevant. Likewise irrelevant is the *Jewel Tea* case, again recounted at length by petitioners. In respondent's original brief (pp. 12, 13), as well as in oral argument, differences between that case and the one at bar were indicated. So far as the waiver question is concerned, it is sufficient to state that the court in the *Jewel Tea* case decided only that an administrator who admitted that his appointment was "void" and that the allegations in this petition with regard to his appointment were false, and who made no claim to authority to act under a de facto status, could not prevail simply because the defendant did not deny the false allegations in its answer. Neither the *Ebner* case, nor any other case cited in this brief, was discussed because the issue before the court was different from the questions raised in those cases and in this case.

Not only does it appear that, under Kentucky law, petitioners waived their right to object to the alleged defect in respondent's Kenton County appointment, but it is also evident that, irrespective of such waiver, the *filing of respondent's original libel tolled the statute of limitations* under the Kentucky law. In *Salyer v. Consolidation Coal Co.*, 246 Fed. 794 (C.A. 6, 1918), cert. den. 246 U. S. 669

(1918), the Kentucky cases applicable to a situation similar to that which petitioners claim to exist in the case at bar were carefully analyzed and construed in a suit for wrongful death brought by decedent's mother as administratrix in a Kentucky court and removed to a federal court. Plaintiff was a married woman and as such, under a Kentucky statute, was ineligible to be an administratrix. After the period of limitations had expired this defense was urged, and the administratrix resigned. A successor administrator was appointed who, together with the mother, asked that he be permitted to continue the action. The trial court ruled that the original appointment was void, that there was nothing to amend, that limitations barred any action equivalent to a new proceeding, and dismissed the suit.

On appeal, the Court of Appeals for the Sixth Circuit assumed that the *Fentzka* case (relied upon in the *Vassill* case) determined that a suit brought by an administrator under a void appointment is no suit at all and that the federal courts are bound by such decision as the law of the state. After making these assumptions, the court said that the question still remained: "Was the appointment of the plaintiff as administrator void, or did it give her at least color of title to the office?" The court added (p. 796):

> "This question has not been expressly decided in Kentucky, but a review of the decisions in the state indicates to us quite clearly what must be considered the Kentucky rule. In such an examination, we must bear in mind that the word 'void' is often loosely used, and perhaps no court is exempt from just criticism in this particular; and it follows that, in cases where the precise distinction between 'void' and 'voidable' is not controlling, the use of the broader word does not end inquiry as to the force of the distinction."

After a meticulous review of the Kentucky cases and statutes the court said (p. 799):

"Our conclusions are—and we need go no further—that under the Kentucky statutes, Mrs. Salyer's appointment ought to be deemed of enough force and effect so that an action begun by her saved the case from the statute of limitations, and that we find no settled rule in Kentucky constraining us to the contrary result.

"Another Kentucky statute confirms this conclusion, although this other statute has not been thought applicable—or, at least, has not received attention—in cases under section 3905. It is section 3848, given in the margin. It is discussed in McFarland's Adm'r. v. Railroad, supra, and clearly makes valid and effectual the beginning of this suit by Mrs. Salyer, if her appointment can be considered as not utterly void."

Section 3848, referred to by the court, is the present section 395.330 of Kentucky Revised Statutes, hereinabove quoted.

The court concluded that since the original plaintiff's appointment was, under Kentucky law, of sufficient effect so that her suit avoided the bar of limitations, the successor administrator could be substituted as plaintiff by amendment under the rule of *Missouri, Kansas and Texas Ry. Co.* v. *Wulf*, 226 U. S. 570 (1913).

The *Salyer* case correctly expounds the Kentucky law. If respondent's first appointment was irregular at all, which is denied, the defect was purely formal, and the appointment was not "void." As the Court of Appeals remarked in its opinion in the case at bar, in such cases "essential justice requires that liberal amendment be permitted."

The foregoing emphasizes the argument made in respondent's original brief and at bar to the effect that:

1. There is nothing in the record to show any irregularity in the original appointment. The mere fact that a year after the appointment the assets were alleged by the

affidavit to be then insufficient or not of the character required as security for costs does not show or prove that there were not sufficient assets to support the appointment of an administrator a year earlier.

2. The appointment was sufficient to qualify the administrator and to enable him to act and to commence an action against the wrongdoers. He acted under color of title and right until his appointment was set aside or otherwise questioned. Such an act was sufficient to bring the real parties in interest, to wit, the dependents and next of kin of the deceased, and the defendants into court and thereby tolled the statute of limitations.

3. The subsequent appointment in an adjoining county of the same administrator, for the same next of kin, in the same estate, is valid and is not questioned. An amendment to this effect in no way changes the cause of action. It does not prejudice anyone and is a mere matter of formal procedure—which respondent contends is proper under both Kentucky law and federal law.

4. Even if the procedure or pleading in Kentucky is differently construed, an amendment of a formal and nominal party is permitted under the decisions of this court, the uniform decisions of the federal courts, and under both the Rules of Civil Procedure and the Admiralty Rules applicable to this case.

5. Respondent submits that this is not the kind of case which should occasion a change in the long accepted and determined law applicable to amendments in admiralty. To deny the right to amend in this case would deny the dependents of the girl who was killed even a day in court and would allow the men adjudged responsible for her death to go Scot free for no reason grounded in substance. Respondent urges that the law of the case was properly made when the Court of Appeals entered its original opinion

and judgment and this court denied certiorari. Respondent does not believe that any change in the law or Admiralty Rules should be made, but, if made, it is submitted such change should be applied prospectively and not retroactively.

Respectfully submitted,

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